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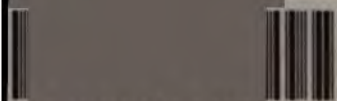
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MICHAEL ERHART

OR

Technical and Civil Engineering

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VERIFICATION, 1814

VERIFICATION, 1814

VERIFICATION, 1814

A

PRACTICAL TREATISE

ON

Ecclesiastical and Civil Dilapidations.

NEW PRINTING OFFICE

• How to find the right person

• How to find the right person  
• How to find the right person

• How to find the right person

• How to find the right person

• How to find the right person

A

*L.H. 1829*

**PRACTICAL TREATISE**

ON

**Ecclesiastical and Civil Dilapidations,**

**RE-INSTATEMENTS, WASTE, &c.**

WITH AN APPENDIX

CONTAINING CASES DECIDED, PRECEDENTS OF NOTICES  
TO REPAIR, EXAMPLES OF VALUATIONS,  
SURVEYS, ESTIMATES, &c.

---

By JAMES ELMES, M. R. I. A.

ARCHITECT AND CIVIL ENGINEER,

SURVEYOR OF THE PORT OF LONDON;

AUTHOR OF ARCHITECTURAL JURISPRUDENCE, MEMOIRS OF SIR CHRISTOPHER WREN,  
AND SEVERAL OTHER WORKS.

---

THIRD EDITION,

CONSIDERABLY ENLARGED.

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*“ By these means ( Dilapidations ) a tolerable house becomes a mean one,  
and a mean one falls into total ruin.”*

BISHOP OF ST. ASAPH, in 1710.

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SAMUEL BROOKE,

LAW PRINTING-OFFICE,

35,

PATERNOSTER ROW, LONDON.

1829.

*806.*





TO

THE RIGHT REVEREND

CHARLES RICHARD,

LORD BISHOP OF WINCHESTER,

PRELATE OF THE ORDER OF THE GARTER,

ƒc. ƒc. ƒc.

MY LORD,

IT has been the peculiar care of every enlightened Prelate, from the earliest ages to the present day, to preserve the ecclesiastical edifices of his diocese, from waste and dilapidation.

A knowledge of the laws which relate to the maintenance of tenements, is necessary to every class of the community; but more especially to those who are connected with ecclesiastical affairs. It is a subject, as your Lordship says, in your kind letter of permission for me to dedicate the following Work to you, of extreme importance to the Church, and of great interest to the Clergy.

By no persons has this knowledge and this duty, been more zealously studied, inculcated and performed, than by those learned and pious men who flourished in that enlightened period of our history, when the ancient jurisdiction of the Sovereign of these

**Realms, over the estate Ecclesiastical and Spiritual, was restored \* to the Crown.**

The monarchical injunctions of King Edward the Sixth, of Queen Elizabeth and of King James the First, and the canons and constitutions of the Archbishops, Bishops and Archdeacons of their respective reigns, abound with solemn injunctions and entreaties, in relation to the due performance of these duties. All these recripts have been productive of the greatest good towards the improvement of every description of ecclesiastical edifice; the dilapidated state of which were much and very justly complained of, in that period of our ecclesiastical history.

The immediate predecessors of the REFORMERS of THE CHURCH OF ENGLAND, were so much devoted to their Papal head, that to accomplish the grand object of the CHURCH OF ROME, the aggrandizement of its metropolis at the expense of all Christendom, they cared not how "the dowry of the church," as Archbishop Stratford emphatically calls its buildings, *at home*, went to decay and dilapidation, so that *the Vatican* and its satellites were embellished. By these means, they introduced into every country that was under its thralldom, a Papal power, as Dr. Ayliffe says, in his *Parergon Juris Canonici Anglicani*, and a church-policy that rendered the LATRIA to GOD, and the DULIA to ROME.

A just knowledge of that part of the ecclesiastical law of this country, that was began by the sixteen temporal and sixteen spiritual persons, under the authority of the statute of the 35th of

---

\* The period generally termed the *Reformation* should more properly be called the *Restoration*, as Lord Coke says, that the act of the 1st Eliz. c. 1, *restoring* to the Crown the ancient jurisdiction over the estate ecclesiastical and spiritual, is not a statute *introductory of a new law*, but *declaratory of the old*.

Henry VIII. c. 16, known by the title of "Reformatio legum ecclesiasticarum," and confirmed by successive Kings and Parliaments, relating to the supporting and maintaining the edifices of the Church, is necessary to all classes, but particularly to those whose avocations are connected with ecclesiastical business.

The Chapter on Ecclesiastical Dilapidations, is almost entirely in addition to the contents of the former editions, and the great importance of its nature, led me to seek a Patron among the Prelates of that establishment for whose use it is principally intended. With this view, I most respectfully avail myself of your permission to dedicate this Work to your Lordship; and to the rest of the enlightened Prelates and Clergy of our National Church; with my sincerest wishes, that it may long continue to flourish in Christian Purity.

I have the honour to be,

Your Lordship's

much obliged and obedient Servant,

JAMES ELMES.

London,

June 24th, 1829.



# **PREFACE**

TO

## **THE THIRD EDITION.**

---

**T**HE Third Edition of this Treatise having grown from a pamphlet to a book, it is incumbent on me to give some reasons for this extension. When I wrote the First Edition, I was young in the practice of my profession, and finding no guide in this important part of it, but the brief Essay by my Friend Mr. Joseph Woods, therein mentioned, I published all that I then knew upon the subject.

On the publication of the Second Edition, I merely added, at a very short notice from my Bookseller, a few necessary elucidations to the Work generally, and a trifling addition to the important branch of the subject which relates to the Dilapidation of Ecclesiastical Buildings.

Immediately after the publication of that Edition, I was called by professional engagements, under government, to Ireland; at which time my attention was first called to the Ecclesiastical Laws of England, as to the endowing, building and supporting churches and other ecclesiastical buildings. From that time, till the day when I was informed the Work was out of print, I continued to



make additions of such matter as I could collect, and for this purpose perused every book relating to the subject which I could procure, both from private sources, and in the library of the British Museum, where I have passed many hours in search of information, towards the extension and improvement of my Work.

This will account for the increase in quantity, and I trust the quality will not be found inferior, for I have indulged in no speculative theories, but have kept as close as possible to practical utility. A work composed of such variety of materials, and from such variety of sources, could not be satisfactorily executed without searching a variety of books. That this has been done, the authorities given for every case herein cited will abundantly prove.

The subject of the following Treatise is of much importance to the public, particularly to the clergy, to proprietors and occupiers of houses, and to the professors of architecture and of the law, as concerning points of professional utility.

Few subjects which lie in so small a compass, have given rise to so much diversity of opinion among men of equal talents and knowledge in other parts of their profession, and none have occasioned greater sources of litigation.

It is however, to be regretted that so few decided cases have been recorded; which is partly owing to the carelessness of legal reporters upon affairs not strictly within the line of their own practice, and in a greater

degree to so many disputes on dilapidations having been made the subject of reference out of Court.

Some years ago, an association was formed in the metropolis by several gentlemen of the architectural profession, for their mutual improvement, and communication

of ideas, called "*The London Architectural Society*," of

which I had the honour of being a Vice-President. The

President, Mr. Joseph Woods, produced and published in the First Volume of our Transactions, a brief and able

Essay on Dilapidations, which cleared the way from many of its difficulties, and fixed, in a great degree, the practice

of valuing and assessing them. I took it constantly for my guide; and, in several litigated cases, was borne

through against men of longer practice and more established name than myself. During the time that has

passed since the publication of Mr. Woods' Essay, I have made those additions to the Second and Third Editions

which I have before mentioned.

The Work will, I trust, be found a faithful and useful compendium of the law and practice of dilapidations and waste, as they now exist, not presuming to hint

at what they ought to be. In my former Editions I ventured to suggest, that my professional brethren should be

called on to amend and alter the present defective Building Act, which Chief Justice Eyre called "an ill-penned law."

Since then I have been honoured by an interview with the Lord High Chancellor, on presenting his Lordship my

recently published Work on Architectural Jurisprudence, (to whom it is, by permission, dedicated) when this subject was mentioned, and his Lordship was pleased to treat

my suggestion with the most condescending attention. I

have made considerable progress in framing heads for a new Bill, in which I have been aided by many useful suggestions from kind professional friends.

Having had the advantage of the opinions and corrections of many eminent practical friends, both in my own and in the legal profession, who have confirmed the authorities of the two first Editions, and have added to the present, I offer this Third Edition with more confidence than the former.

Any hint for alterations, additions or amendments, addressed to me, will be respectfully attended to in any future Edition.

J. E.

*June, 1829.*

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A  
TREATISE  
ON  
DILAPIDATIONS.

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CHAPTER I.

ECCLESIASTICAL DILAPIDATIONS.

*Definition—wherein Dilapidation differs from Waste—Species of Dilapidation—Ecclesiastical Dilapidations—Dilapidation of Ecclesiastical Buildings often a cause of Deprivation—Neglect of repairing the Church &c.—Successors defended against the Dilapidations of their Predecessors—Permissive Dilapidations—Remedies against fraudulent Deeds to defeat Dilapidations—Ordinary may enforce Repairs—Suits in Spiritual Courts—Dilapidations must be paid before Legacies—Power of Ecclesiastical Courts—Gilbert's Act—Architects making erroneous Estimates—Prevention of Dilapidations—Power of Bishops in such cases—Of Archdeacons, Deans and Chapters—How to be valued and by whom—Money recovered for, how to be expended—Incumbents of Churches burnt at the Fire of London not liable—Power of Churchwardens—Opinions of various Prelates on Dilapidations—ImproPRIATORS bound to repair—Prebendaries also liable—Examples of remedied Cases &c. &c.*

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**DILAPIDATION**, in the ordinary acceptation of the word, Definition.  
is the injury which has accrued to houses, buildings or erections, during a temporary possession by one party, whereby a successor or reversioner sustains damage, and for which the laws and customs of this realm, have provided and pointed out certain remedies.

A

Differs from  
waste.

Although the term *waste* would be more comprehensive in signification, and is most frequently made use of in legal documents and discussions, it is not applicable to the subject of the present treatise; which is intended to embrace only those injuries that have been sustained by houses, buildings and erections, including, of course, churches and their appendages.

The word *dilapidation*, has therefore been substituted as a more limited signification, being a sort of waste, similar indeed, in most respects, as to the common-law principle, but differing materially as the subject of statutory provision.

Species of di-  
lapidation.

The subject of *dilapidations* must be considered under two principal heads, *ecclesiastical* and *civil*, and then again under several sub-divisions or branches, in order that the various questions and considerations on this important subject may be kept perfectly clear and distinct.

These two branches of my subject have, it is true, certain principles common to both, and might therefore be discussed simultaneously; but as the foundation of the remedial measures, for injuries sustained, are to be traced from ancient customs and modern enactments, perfectly distinct and dissimilar, and as in ecclesiastical cases, there is an option of seeking redress through either the spiritual or temporal jurisdictions; it will be the safer course to avoid any inter-mixture of the two subjects, and to consider them as perfectly distinct and dissimilar branches.

Ecclesiastical  
dilapidations.

The ecclesiastical portion of the subject, is fairly entitled to precedence, from the antiquity of those customs and regulations to which church tenures are subjected, and the far greater degree of importance attached to them by numerous writers. In fact, the word "*dilapidation*" has not, until within these few years, been considered in any other sense, than as applicable to ecclesiastical matters. *Blackstone* considers the word to mean a sort of ecclesiastical waste, apparently considering the word not applicable in a civil sense. *Johnson*, in his Dictionary has only one definition, which refers exclusively

to ecclesiastical matters, and quotes only one writer, Dr. *Ayliffe*, an ecclesiastical lawyer. I consider this as extraordinary, as questions must have been started in his time, as to the sense in which covenants to repair, sustain, maintain, uphold &c. should be considered, and most probably the term *civil* dilapidations as opposed to those of an *ecclesiastical* nature, may have been in use, at least among professional men; although I know of no author who has used the term before myself.

It is manifestly therefore, not improper to consider the ecclesiastical, as the main branch of our subject of dilapidations, which we will forthwith proceed to examine.

Ecclesiastical dilapidations, says *Blackstone* (a), are a sort of waste; and are either *voluntary*, by pulling down; or *permissive*, by suffering the chancel, the parsonage-house or other buildings thereunto belonging, to decay. An action also lies, either in the Spiritual Court, says *Carter* (b), by the canon law, or in the courts of common law, and it may be brought by the successor against the predecessor, if living, as in the case of *Jones v. Hill* (c), or if dead, against his executors, as in that of *Young v. Munby* (d). Lord *Coke* (e) says that it is a *good cause of deprivation* (f), if a bishop, parson, vicar or other ecclesiastical person, dilapidates the ecclesiastical palaces, houses and buildings, or cuts down timber growing on the patrimony of the church unless for necessary repairs, as ruled by the Court of King's Bench in the case of *Stockman v. Wither* (g), and that a writ of prohibition will also lie against him in the courts of common law, as decided by the same court in the case of *Knowle v. Harvey* (h).

Dilapidations  
often a cause  
of deprivation.

(a) Blackst. Com. book iii. ch. vii.

(b) Cart. Rep. p. 224.

(c) See Appendix, No. I.

(d) Appendix, No. II.

(e) Co. 3 Inst.

(f) Bishop Gibson\* says, that though in equity, that punishment may well

belong to dilapidations; yet that it hath ever been inflicted, appears not by any thing that is alleged, either out of the books of common or canon law; which speak only of *alienations*.

(g) Appendix, No. III.

(h) Appendix, No. IV.

\* Gibs. Cod. Jur. Eccl. tit. xlv. cap. 10.



*Dilapidating the church and buildings*, destroying the woods or alienating the lands belonging to the church, by any bishop, abbot, prior, parson, vicar &c. have been held, says Sir *Simon Degge* in his *Parson's Counsellor* (a), and adjudged good causes of deprivation, and it were very fit, he observes, that the canons in this case were put in execution.

By the statute of 13th Eliz. c. 10, if any spiritual person makes over or alienates his goods with intent to defeat his successors of their remedy for dilapidations, the successor shall have such remedy against the alienee, in the Ecclesiastical Courts, as if he were the executor of his predecessor. And by the statute of 14th Eliz. c. 11, all money recovered for dilapidations shall within two years be employed upon the buildings, in respect whereof it was recovered, on penalty of forfeiting double the value to the crown.

Neglect of repairing the church &c.

As to the neglect of reparations of the church, the churchyard and the like, the Spiritual Court, says Lord *Coke* (b), has undoubted cognizance thereof; and a suit may be brought therein for non-payment of a rate made by the church-wardens for that purpose. And these says *Blackstone* (c), are the principal pecuniary injuries, which are cognizable, or for which suits may be instituted, in Ecclesiastical Courts.

Successors to livings defended against the dilapidations of their predecessors.

The statute 1st Eliz. c. 19, rendered all grants of hereditaments belonging to any archbishoprick or bishoprick, that should be made to any person or persons (other than for a term of twenty-one years, or for three lives, with accustomed rent) utterly void; and the 13th of the same Queen, c. 10, intituled "Fraudulent deeds made by spiritual persons to defeat the successors of remedy for dilapidations shall be void," rendered similar grants by deans, deans and chapters, or by any other persons having ecclesiastical livings, also void; was enacted for the purpose of preserving the rights of suc-

(a) Degge's Pars. Couns. part i. c. 9.

(c) Com. book iii. ch. vii.

(b) Co. Rep. vol. v. p. 66.

cessors against any illegal practices of the *present possessors*; and is worthy the attention of all ecclesiastical persons and their surveyors.

This act, which was passed in the year 1571, enacts that fraudulent deeds made by spiritual persons to defeat their successors of remedy for dilapidations shall be void; and recites, that "whereas divers and sundry ecclesiastical persons of this realm, being endowed and possessed of ancient palaces, mansion-houses and other edifices and buildings, belonging to their ecclesiastical benefices or livings, have of late years, not only suffered the same for want of reparations, partly to run to great ruin and decay, and in some parts utterly to fall down to the ground, converting the timber, lead and stones to their own benefit and commodity; but also have made deeds of gift, colourable alienations, and other conveyances of like effect, of their goods and chattels in their lives-time, to the intent and of purpose after their deaths to defeat and defraud their successors of such just actions and remedies as otherwise they might and should have had for the same against their executors or administrators of their goods, by the laws ecclesiastical of this realm, to the great defacing of the state ecclesiastical, and intolerable charges of their successors, and evil precedent and example for others, if speedy remedy be not provided."

Ecclesiastical persons permitting dilapidations.

It is therefore enacted by that statute, that if any ecclesiastical persons (all of whom are therein named) be guilty of such fraud, the successor so defeated of his remedy for dilapidations shall have the same remedy against him, to whom such deed is made, as if he were executor or administrator.

This act, says Sir *William David Evans*, in his arranged Collection of the Statutes, is a public act, and extends to the King although not named; it also extends to all colleges, by whatever name incorporated, whether temporal for the advancement of the liberal arts and sciences, or mere ecclesiastical or mixed, and to all hospitals, whether the corporation be sole or not. He refers to the case of *The Master*

and Fellows of Magdalen College in Cambridge (a), as decisive on this point; of which case Lord Coke says, it tends to the maintenance of God's true religion, the advancement of liberal arts and sciences, the supportation of the ecclesiastical state, the preservation and prosperity of those two famous sisters the Universities of Cambridge and Oxford, and of all the colleges within the realm, and the establishment of hospitals and provisions for the poor.

Hedges,  
fences &c.  
liable to di-  
lapidations.

Although in the preamble to this statute, nothing is referred to as liable to *dilapidations*, but decayed or ruinous *buildings*; yet it is certain, says Bishop Gibson (b), that under the same name are comprehended hedges, fences and such like, in the like condition; and it hath been particularly adjudged concerning *wood* and *timber*, that the felling of them by any incumbent, otherwise than for repairs, or for fuel, is *dilapidation*; from which he may be restrained by prohibition during his incumbency, and for which he or his executors are liable to be prosecuted, after he ceases to be incumbent (c). Besides the cases cited in the note, it is likewise so ruled in the *Reformatio Legum Ecclesiasticarum*, published by authority of King Henry 8, and afterwards with additional provisions by Edward 6, and may therefore be taken for law upon so many authorities (d). *Lyndewode* also in his *Gloss, or Commentary on the Provincial Constitutions*, remarking on the words "defects of houess and other things," says, that is of which the bene-

(a) Appendix, No. IX.

(b) Gibs. Cod. Jur. Eccl. tit. xxxii. c. iii.

(c) See Bulstr. vol. ii. p. 279. Ibid. vol. iii. p. 158. and Rolle's Rep. vol. i. p. 335.

(d) Ref. Leg. Eccl. fo. 39. v. where the rule is as follows: "Si quis arbores, arbusta, lucos, nemora, sylvas, quas-  
cunque *lignorum* opportunitates, ullius ad se Beneficii Ecclesiastici jure pertinentes, licentiosius quam necessitas

tulerit, sine consensu proprii illius ditionis Episcopi, vendiderit, succiderit, amputarit, asportarit, aut quocunque modo corruerit et vastarit; precium is universum, et æstimationem omnium hujusmodi Lignorum, distractorum et eversorum, in Cistam Pauperum attributam plenè conferit: Præterea, tantum in hoc re successoris satisfaciet, quantum Episcopus æquum esse putabit."

### *Remedies against fraudulent Dilapidations.*

7

fixed person hath the burthen and charge of reparation; as of the chancel, inclosures, hedges, ditches and such like(a).

The before cited act, namely, the 13th Eliz. c. 10, makes provision against the particular abuse of *fraudulent deeds*, to defeat the successor after the incumbent is dead; and by the rules of the church, as appears from its constitutions (b), the ordinary in case of dilapidations, hath a right to take cognizance of them, during the *life* of the incumbent, either by *voluntary inquisition* or upon *complaint* made to him; and to enforce reparation by the sequestration of profit, or by ecclesiastical censures, even to deprivation (c).

Remedies against fraudulent deeds to defeat dilapidations.

The ordinary may enforce reparations.

As to the *proportion* of the profits that may be so sequestered; that is left to the *discretion of the ordinary*, according as particular occasions may require: and there is no certain rule, says Bishop Gibson (d) for it; but only an example in the injunctions of King Henry 8, as follows:—"Also that all parsons, vicars and clerks, having churches, chapels or manations, within this deanery, shall bestow yearly hereafter, the *fifth part* of their benefices, till they be fully repaired; and the same so repaired shall always keep and maintain in good state."

What proportion may be sequestered for dilapidation.

The same injunction is continued, in those which were published by King Edward 6, and Queen Elizabeth (e), but the rule in the *Reformatio Legum* was the *seventh part* (f); and

(a) "Honorum pertinentiam ad ipsorum beneficiatorum opus et reparationem, ut puta cancelli, librorum, murorum, fossarum, sepium, claustrorum et aliorum hujusmodi." Lyndevode, lib. iii. tit. 27. cap. 3.

(b) Gibs. Cod. Jur. Eccl. tit. xxxii. c. iii.

(c) Bulstr. vol. iii. p. 158. Co. 3d Inst. p. 204. 29 Ed. 3. c. 16. 2 H. 4. f. 3. 9 Ed. 4. c. 34.

(d) Gibs. Cod. Jur. Eccl. tit. xxxii. c. iii.

(e) See tit. *Injunction*, in Architectural Jurisprudence, by the Author of this Work.

(f) "Episcopus septimam annui portionem emolumenti apud sequestros faciet seponi, donec aut Domus nova omnibus Ministri necessitatibus apta, denuò construatur, aut ruinosa sedes sartæ tectæ fiant." Ref. Leg. Eccl. fo. 39 a.



Archbishop *Bancroft's Circular Letter* (*a*), in the article relating to the sequestration of livings, where houses are out of repair, leaves the proportion entirely to the ordinary, with only this limitation, "allowing a fit portion for the incumbents to live upon."

Suits for dilapidations in Spiritual Courts.

But to return to the statute itself, and its interpretation: in a suit for dilapidations in the Spiritual Court (*b*), an executor of an administrator prayed a prohibition, upon oath that he had no goods of the first intestate; and the court agreed, that the executor of an administrator is not liable, unless he hath goods of the first intestate, or, be administrator *de bonis non administratis* by the administrator. Upon which the prohibition was granted and stood.

Executors chargeable with dilapidations must pay for them, before any legacies.

Executors, who are chargeable with ecclesiastical dilapidations, are bound by law, to make satisfaction for them *before* the payment of any legacies (*c*): "and it might be hoped" says Bishop *Gibson* (*d*) in a note on this rule "before the payment of any other *debts*; since THE REPAIRING OF DILAPIDATIONS IS, in the strictest sense, A DEBT TO THE CHURCH; and it seems hard, that *private* debts should be satisfied out of the spoils of the church, and the church herself be denied the common right of restitution. For whatever substance any incumbent gets from the church, and dies possessed of, is *greater* in proportion to his *neglect* of repairs; and that part that grows from such neglect, is no better than a theft from the church; whose rights and privileges were anciently the first care of the law." But, Sir *Simon Degge*, in his *Parson's Counsellor* (*e*) says "there has been made a further question,

(*a*) Registr. Banc. fo. 168 *a*.

(*b*) Keb. Rep. vol. iii. p. 619.

(*c*) "Si legatarii, tanquam creditores, petant legata sibi relicta, et Prælati Ecclesiæ petat sumptus reparationis ædificiorum Ecclesiæ, talis Prælati debet preferri cæteris legatariis;

nam egata solvi non debent, nisi prius deducto ære alieno." Lyndewode, on Archbishop Edmund's Constitutions, p. 250.

(*d*) Gibs. Cod. Jur. Eccl. tit. xxxiii. c. iii.

(*e*) Degge's Pars. Couns. part i. c. 8.

whether satisfaction for dilapidations should be preferred in payment before debts and legacies: and as *the common law* prefers the payment of debts before damages for dilapidations; so *the ecclesiastical law* prefers the damage for dilapidations before the payment of legacies." Sir *Simon* then quotes *Lyndeswode's Gloss, upon Archbishop Edmund's Constitutions* given in the note, and concludes by saying "so that the ecclesiastical law agrees with the common law in this, that debts are to be preferred before legacies."

In animadverting upon the words "by the laws ecclesiastical" in the statute now under consideration, Bishop *Gibson* (a) observes, "that in acknowledgment of the rights of *the Ecclesiastical Courts* to the sole cognizance, upon this head of dilapidations; a writ of consultation (b) is provided by our constitution, to screen them from the encroachments of *the Temporal Courts*." The law ecclesiastical, thus referred to by the statute, is compounded; says Dr. *Burn*, in the Preface to his Work on that subject, of four principal ingredients; namely, the *civil law*, the *canon law*, the *common law*, and the *statute law*.

Power of Ecclesiastical Courts as to dilapidations.

Pursuant to the meaning and tenor of the above-mentioned writ; the statute refers persons aggrieved, wholly to the Ecclesiastical Courts. The first writer, says Dr. *Gibson*, who advanced the notion of *an action on the case in the Temporal Courts for ecclesiastical dilapidations*, was Sir *Simon Degge* (c); who also referred for proof of it, to several precedents, before the Reformation, whereof he gives a large list in his margin. From these several precedents he infers that by the custom of England, which is the common law, that all ecclesiastical persons are bound to repair their ecclesiastical edifices, and upon this custom, he says *actions on the case* have been frequently brought, both anciently and of later times, and damages re-

Persons aggrieved referred to the Ecclesiastical Courts.

(a) *Gibbs. Cod. Jur. Eccl. tit. xxxii. c. iii.*

(b) For a copy of this writ see Appendix, No. V.

(c) *Degge's Pars. Couns. part i. c. 8.*

covered (a). But in the case of *Jones v. Hill* (b), tried in the first year of William and Mary, the Lord Chief Justice Sir HENRY POLLEXFEN, adjudged at the Warwick Assizes, that being a cause of *ecclesiastical dilapidations*, it was only triable in the Spiritual Court. Notwithstanding which, when the self-same cause was brought into the Court of Common Pleas, although it appeared upon examination of the records, that judgment was not given in any of the precedents cited by Sir Simon Degge, and Chief Justice Pollexfen strongly adhered to his first opinion, and the court inclined the same way, even though it had otherwise been determined in the 3d James 2. in the case of *Day v. Hollington*; yet the cause being delayed and reheard, and Sir Henry Pollexfen, and Sir Peyton Ventriss, both dying in the mean time, judgment was afterwards given by the other two judges, that the action did well lie in the *Temporal* Court. The same rule was resolved again in effect, in the 6th year of William 3, in the Court of Common Pleas, in the case of *Oke v. Ange* (c), inasmuch as the plaintiff in the Spiritual Court was adjudged to be barred from suing there, by his having before brought an action on the case, in the Temporal Court upon the same matter.

Ecclesiastical dilapidations by whomsoever occasioned, must be paid for by the last incumbent.

So rigid is the ecclesiastical law, in relation to dilapidations of ecclesiastical buildings &c. that although the before cited statute of Queen Elizabeth in the particular case of a *fraudu-*

(a) The original runs as follows:—  
 “Omnes et singuli præbendarii, rectores, vicarii Regni Angliæ pro tempore existentes, omnes et singulos domos et edificia præbendarum, rectoriarum et vicariarum suarum reparare et sustentare, et eu successoribus suis reparata et sustentata dimittere teneantur. Et si hujusmodi, præbendarii, rectores et vicarii domos et edificia hujusmodi successoribus suis sic, ut præmittatur, reparata et sustentata non demiserunt et deliquerunt; sed ea irreparata et dilapidata permiserunt,

executores sive administratores bonorum et catellorum talium præbendariorum, rectorum et vicariorum, tantam pecuniæ summam quantam pro necessaria reparatione et edificatione hujusmodi domorum et edificiorum expendi aut solvi sufficiet, satisfacere tenantur.” T. 18 Hen 7. ro. 67. C. B. P. 12 & 13 Hen. 8. ro. 126. C. B., H. 15 Hen. 8. ro. 306. C. B., M. 12 Hen. 8. ro. 750. C. B., H. 15 Jac. ro. 474 &c.

(b) Lev. Rep. vol. i. p. 268.

(c) Appendix, No. VI.

lent conveyance, seems at first sight to limit the suit to the dilapidations that had grown in the time of *the last incumbent*; which, (in case his predecessor also left dilapidations and died insolvent) cannot be known, but by a regular survey of the defects at his first taking possession, that thereby the respective dilapidations of the two predecessors may be distinguished.

But in other cases, the last incumbent, or his executors, are chargeable with the *whole dilapidations*, in whose time soever they may have accumulated: and agreeably to the general rule, may this statute be well interpreted, so as to make the clause "by his fact or default" to be inclusive, not of dilapidations which had grown in the time of the predecessors of the deceased, but of such as may have grown between the time of his decease, and the prosecution for them; that is, either in the time of the vacation of the benefice, or since the time of the present incumbent (a).

Bishop Gibson admits, that in some cases this may prove a great hardship; particularly, where a heavy burthen of dilapidations, is left by an incumbent who died insolvent, and the successor enjoys the benefice for only a short time and then dies. But in such a case, the *Reformatio Legum Ecclesiasticarum*, has provided an equitable mitigation, by which the ecclesiastical judge is to allow only a reasonable compensation, according to the time, that the incumbent enjoyed possession (b). "And it were much to be wished" says the Bishop "that such incumbents who shall *repair* or *build*, where there is great occasion, in such manner and to such degrees as the patron and ordinary do approve after a proper survey and inspection made; were entitled to receive back such proportion of the expense, as might be assigned and limited by a statute

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(a) Gibs. Cod. Jur. Eccl. tit. xxxii. c. lii.

(b) "Spatium tamen possessionis erit considerandum: quod si totum annum non impleverit, nihil postulabitur:

quantum autem anno fuerit amplius, ad id æquitas Judicis ecclesiastici satisfaciendi rationem accommodavit." Ref. Leg. Eccl. fo. 39 b.



for that purpose, to be paid by the next incumbent to their executors; and to him by successive incumbents; so far, and with such gradual diminutions, as the law should think fit and proper.

**Gilbert's Act.** This has been done in some measure, by the enactments of the statute of the 17th Geo. 3. c. 53, commonly called *Gilbert's Act* (having been brought in by that gentleman) which has been explained and amended by the 21st of the same King, c. 66. Its intentions are to promote the residence of the parochial clergy, by making provision for the more speedy and effectual building, repairing or purchasing houses, and other necessary buildings and tenements, for the use of their benefices.

**When the parsonage-house requires rebuilding &c.**

When there is no house of habitation to a benefice, or the same is ruinous, or so mean, that one year's net income will not be sufficient to build, alter &c. the same, the aforesaid statute, § 1, provides that the incumbent if he thinks fit, may apply for the aid given by this act; first procuring a survey from some skilful workman or surveyor, of the condition of the buildings, and a plan and estimate of the work proposed to be done, verified upon oath before some justice of the peace, or master in chancery, together with a particular account in writing, signed by him and verified on oath, of the annual profits of such living, before the ordinary and patron, and obtaining their consent to such proposed new buildings or repairs under their hands, in the form specified by the act (a).

**When there is no house of habitation in livings of above £100 a-year.**

When there is no house of habitation upon any ecclesiastical living, exceeding £100 clear annual value, or being one, the same shall be mean or in a state of decay, and the incumbent shall not reside in the parish twenty weeks within any year, computing from January the 1st, the same statute, § 8 enacts that the ordinary, with the consent of the patron (in case the incumbent shall not think fit to lay out one year's income,

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(a) See Appendix, No. VII.

where the same may be sufficient, to put the house in proper repair, or make such application as aforesaid, for building, repairing or rebuilding such parsonage-house) may procure such plan, estimate and certificate as directed in the Act(a), and at any time within the succeeding year, proceed in the execution of this Act, in such manner as the incumbent would have been authorized to do.

The same (*Gilbert's*) Act, § 5, provides that every such ordinary, before he signifies his consent to any proposed new buildings, shall cause an inquiry to be made and certified to him by the archdeacon, chancellor of the diocese, or other proper persons living in or near the parish where such buildings are proposed to be made or repaired, in the forms for that purpose specified in the said schedule(b), of the state and condition of such buildings at the time the incumbent entered upon such living or benefice, how long such incumbent had enjoyed such living or benefice, *what money he had received, or may be entitled to receive for dilapidations*, and how and in what manner he had laid out what he had so received; and if it shall appear to them that such incumbent had *by wilful negligence suffered such buildings to go out of repair*, they are to certify the same to the said ordinary, and also the amount of the damage which such buildings had sustained by the wilful neglect of such incumbent; and such incumbent, if the ordinary require it, shall pay the same into the hands of the nominee(b) or nominees to be appointed under the authority of the Act, towards defraying the *expenses of building or repairs*, before the ordinary shall give his consent.

Ordinary to cause inquiry to be made of the condition of the buildings when incumbent entered on the living.

The 9th section of the same statute enacts that all sums of money recovered or received by suit or compositions, from the representatives of any former incumbent of such living or benefice, and not laid out in the repairs of such buildings shall go and be applied in part of the payment under such estimate as aforesaid; and that all money thereafter to be re-

Money received for dilapidations to be applied in part of payment &c.

(a) Appendix, No. VII.

appointment of nominee &c. &c. see

(b) For the forms of the consent, nomination, award and determination,

Appendix, No. VII.

covered or received, in case the same cannot be had before such buildings are completed and the money paid for the same, shall be applied as soon as received in payment of the principal then due, (probably meaning *on mortgage*) as far as the same will extend; or in case the said mortgage-money shall have been discharged, all such money *arising from dilapidations* shall be paid into the hands of the nominee to be appointed (a) as aforesaid, or of some other person or persons to be nominated by the ordinary, patron and incumbent, in case such nominee shall be dead or shall decline to act therein, to be laid out and expended in making some *additional buildings* or improvements upon the glebe of such living or benefice, to be approved by the ordinary, patron and incumbent; and in the mean time, or in case such buildings shall not be necessary, then in trust, to lay out the same in government or other good securities, and pay the interest thereof to the incumbent for the time being.

Colleges &c.  
empowered to  
lend money for  
building such  
ecclesiastical  
edifices.

Any college or hall in Oxford and Cambridge, and any other corporate bodies possessed of the patronage of ecclesiastical livings may advance any money of which they have the disposal, to aid the purposes of this act, for the building, rebuilding, repairing, or purchasing of any houses upon livings under their patronage, upon the mortgage directed by this act for the repayment of the principal, without taking interest for the same (b).

If long vacant  
an allowance  
is to be made  
for repairs.

If the living has been vacant for some time, as for three or four years; or if the incumbent has not sued for some time after his induction or installation, nor caused the dilapidations or want of repairs to be surveyed and estimated, he will not be entitled to the whole sum estimated for dilapidations, but an allowance or consideration must be made for the time so elapsed from the termination of the last incumbency, and a proportionable deduction made for the decays which may reasonably be supposed to have happened during such intermediate time (c).

(a) Appendix, No. VII.

(b) Same Act, § 13.

(c) Clarke's Pr. Eccl. tit. 136. Ought.  
Ord. Jud. vol. i. p. 255.

Thus far this important Act—we shall now proceed with the other authorities.

If the bishops and archdeacons, says Sir *Simon Degge*(a), would take care, these dilapidations might easily be avoided, which are a great dishonour to the clergy, and cannot be pleasing to God Almighty or good men, and the canon entitled "*Archidiaconi et infra*" enjoins the archdeacon and other officials to this duty (b).

In a work called *The Clerk's Instructor in the Ecclesiastical Courts* it is said (c)—If the architect, surveyor or workmen, who surveyed and estimated the amount of dilapidations for the party who sues for its recovery, shall, either for favour, or because they have taken the work upon themselves, or have obtained a promise thereof, depose that the decays or dilapidations cannot be repaired for less than such a sum, the defendant, if he shall see cause, may produce witnesses to the contrary, and be permitted to take or send architects, surveyors or able workmen, upon the premises, and may make exceptions, and disprove the specification or estimate, if it be erroneous, or excessive, by other more skilful or more honest witnesses.

Architects making erroneous estimates.

The bishop may prevent dilapidations from happening to the parsonage-houses of every benefice within his diocese, by spiritual admonitions and censures, and even by deposition or deprivation, or at least suspension till his injunctions be obeyed; and the next incumbent of a living may recover damages for dilapidation in the Spiritual Court as before mentioned, or in an action on the case at common law.

Prevention of dilapidations.

By the decision in the case of *The Curate of Orpington*(d), who was appointed by the impropriator, and licensed by the archbishop as ordinary; the court held that being but a curate as well, and not instituted and inducted, he was not an incum-

A curate at will, not liable to dilapidations.

(a) Degge's Para. Couns. part i. c. 9.

(b) "Ut in visitationibus ecclesiarum faciendis diligentem exhibeant considerationem ad fabricam Ecclesie & maxime cancelli, si forte indigeant reparandis, et hi quos tenebunt de-

fectus hujusmodi, certum sub pena præfigant terminum infra quem emendantur vel suppleantur &c."

(c) Clerk's Instructor, tit. 125.

(d) Keb. Rep. vol. iii. p. 614.

bent within the meaning of the statute 13th Eliz. c. 10. nor liable to dilapidations; and, accordingly, prohibition was awarded, to stay the suit that was instituted against him, in the Spiritual Court.

No prohibition lies, where a Spiritual Court punishes for neglecting a church or church-yard.

By the statute 13th Edw. 1. c. 1. entitled "Certain cases wherein the King's Prohibition doth not lie," it is enacted that "Also if the prelates do punish for leaving the church-yard uninclosed; or, for that the church is uncovered, or not conveniently decked, in which cases none other penance can be enjoined but pecuniary." Therefore dilapidations in such cases are to be assessed according to value. Although this statute be absolute in all cases, yet it was declared in the case of *Claydon v. Duncombe* (a), in the 14th Charles 1. that where particular persons are bound by custom to make good so much of the fence as adjoins to their several grounds; they shall be sued upon neglect in the *Temporal* and not in the *Spiritual* Court.

Bishops to compel non-residents to keep their houses in repair.

The statute 57 Geo. 3. c. 99. (which repeals 21 Hen. 8. c. 13. §§ 1. 26. 28. 30. 32. 34. 35; 28 Hen. 8. c. 13; 13 Eliz. c. 9. § 8; 3 Car. 1. c. 4. § 2) enacts, in § 14, That every spiritual person having any house of residence on his benefice, who shall not reside therein, shall, during period or periods of non-residence, whether for the whole or part of a year, *keep the same in good and sufficient repair*; and if he neglect to do so, and on monition from the bishop in whose diocese it is legally situate, shall not put it in repair according to, and within the time therein mentioned to the satisfaction of the bishop, and to be certified to him upon such survey and report as shall be required by the bishop in that behalf, shall be liable to the penalties of non-residence, notwithstanding exemption or licence, during the time such house is out of repair, and until it has been put in good repair to the satisfaction of the bishop of the diocese (b). And by § 63 of the same statute it is provided, that when a curate is appointed by the incumbent, and receives the whole profit of the benefice, he must allow, if ordered by the bishop, any sum, not exceeding one-fourth of such profit as shall have been expended, in

Penalties for omission.

(a) Rolle's Abr. vol. ii. p. 287.

(b) Gibb. Cod. Jur. Eccl. p. 387.

*repair of the chancel, house of residence &c.* in respect of which such incumbent or his executors would be liable for dilapidations to the successors.

By the same statute, same section, a licence may be obtained by persons holding any benefice wherein there is no house of residence, or, where it is unfit for residence, such unfitness not being occasioned by any default of such person, and the same being kept in repair by him to the satisfaction of the bishop. Or, if he occupy in the parish any mansion or messuage, he keeping in repair such house of residence, and producing proof thereof to the satisfaction of the bishop, at the time when the licence is granted or renewed.

Where no house, a licence for non-residence may be obtained.

As soon as a bishop is installed, or a rector or vicar inducted, he ought to procure an architect, surveyor of buildings, or able master builder to view the state of repairs and dilapidations of the churches, houses and other buildings belonging to the diocese, rectory or vicarage, to report such as may want repairing, to make specifications of what repairs or re-instatements are necessary to be done, and an estimate of the sum for which a responsible builder or able workman will re-instate or repair the same, and testify to the truth thereof by his signature as a memorial whenever he should be required as a witness. For after this survey shall be made, such bishop, rector or vicar, may commence his suit for dilapidations, if a sufficient compensation for the same be not offered, as soon as he pleases. And such architect, surveyor or workman should be prepared to prove, that such decays or dilapidations cannot be sufficiently amended for less than such sum, and that they themselves could not do the works, or procure them to be done for less. In order that such proof may be sufficient, it is necessary that there be two witnesses to each particular, and not one witness to one kind of work, and another to another (a).

On the installation of a bishop &c. a survey of his buildings should be made.

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(a) Clarke Pr. Eccl. tit. 124. Ought. Ord. Jud. vol. i. p. 253.



Power of  
bishops as to  
ecclesiastical  
buildings.

Among other powers which are given to bishops, and are purely spiritual, may be enumerated those of consecrating churches when newly built, visiting parishes and *inspecting the state of repairs and dilapidations of buildings belonging to the church*; and of admonishing their clergy when their houses or churches or other parts of their benefices are out of repair (*a*). In this department of their duty they are to be assisted by their archdeacons; who are the next personages in the church to the bishops. They are termed by Pope Gregory the Ninth in his celebrated *Decretals* (*b*), the bishops' vicars or vicegerents, and Pope Clement the Fifth gives the archdeacon the title of *Oculus Episcopi*.

Power of  
archdeacons.

Archdeacons, says Dr. Aylmer in his *Parergon Juris Canonici Anglicani* (*c*), may visit their dioceses every year, and, even oftener if it be expedient; but they are not compelled by law to visit oftener than every three years, *triennio in triennium*. Archdeacons and their officials are enjoined by the *Provincial Constitutions* (*d*), that in all the visitations, they may make of their churches, they show especial regard in their inquiries touching the structure and fabric of them, which consists, says this authority, in the walls, windows, coverings and the like, and particularly in respect of the chancel (*e*).

(*a*) "Statuimus et præcipimus, ut universi clerici suorum beneficiorum domos et cetera ædificia, prout indigerint reficere studeant condecenter, ad quod per episcopos suos vel archidiaconos moneantur." Oth. Const. tit. xvii.

(*b*) Dec. lib. i. tit. 23. c. i.

(*c*) Aylm. Par. tit. Archdeacon.

(*d*) "Injungimus archidiaconis et eorum officialibus, ut in visitationibus ecclesiarum faciendis diligentem adhibeant considerationem ad fabricam ecclesiæ" &c. &c. Archbishop Reynolds's Constitutions, lib. i. tit. 10. cap. 4.

(*e*) The *chancel* of a church is pro-

perly the eastern part or end where the altar is placed; and in former days, was the place allotted to the *Cantores* or Choristers. It receives its name from *cancelli* the lattice-work or cross-barred partition that was formerly interposed between the choir or chancel and the nave. Lyndewode in his gloss upon Archbishop Mepham's Constitutions (lib. iii. tit. 27. p. 53.) thus defines it:—"Cancellus est interstitium inter propugnacula murorum quale est quod claudit chorum à navi ecclesiæ; Papias verò dicit cancellus est cantorum excellens locus. Et consimile verbum habes in constitutione Othoboni."

By the before-mentioned statute of the 17th Geo. 3. c. 53, commonly called *Gilbert's Act*, the 5th section enacts, that *the amount of dilapidations is to be ascertained by the archdeacon, or any proper person that he may appoint*, and certified to the ordinary; and the 9th section, that the amount recovered is to be paid to the nominee of the ordinary, to be expended in repairs. An action on the case, says Sir *Simon Degge* (a), will lie against an archdeacon if he neglect to do his duty.

Archdeacons empowered to see to repairs of parsonages &c.

The mansion-houses of incumbents, says Bishop *Gibson* (b), with the other edifices, being ecclesiastical fabrics, erected for the immediate service of the church, are and have long been the care of the archdeacon equally with the church itself.

By a legatine (c) constitution of Cardinal *Othobonus*, promulgated A. D. 1268, 52 Hen. 3, it is ordered that none through covetousness, may neglect their houses, churches or other parts of their ecclesiastical benefices, nor suffer them to run into decay, ruin or dilapidation, the *bishop or archdeacon* shall admonish them to repair and re-instate such dilapidated edifices belonging to the church. And, in case of neglect, the bishop is empowered to do it at the charge of the incumbent. The same is decreed concerning chancels, and prelates are also enjoined to keep their own houses in repair (d).

Bishops and archdeacons are to urge repairs of dilapidations.

(a) Degge's Pars. Couns. p. 7.

(b) Gibb. Cod. Jur. Eccl. App. § 15. fo. 1552.

(c) These legatine constitutions of our church, which have still the force of law among ecclesiastical persons and affairs, were made and published in England in the time of *Orto*, who was legate from Gregory 9, and *Othobonus* (afterwards Pope Adrian 5) the legate from Clement 4, A. D. 1268. These constitutions were published in Latin, under the title of "*Orto et Othobonus Papæ Legatine in Anglia, eorum Constitutiones Legatine, cum interpretatione Domini Johannis*

*Athen.*" The Commentary, Annotation or Glossa, of John Atho, is cited as of equal authority with the text, by all ecclesiastical law writers, from his time to the present. These legatine constitutions extended their authority equally to both provinces, having been made and acknowledged in national synods or councils held here by the respective legates, who have given their names to them, in the reign of Henry 3, about the years 1230 and 1268.

(d) "Improbam quorundam avaritiam prosequentes, qui cum de suis ecclesiis et ecclesiasticis beneficiis multa bona



Pursuant to this practice, the Bishop of Chichester, in December 1686, commissioned two clergymen to visit every church, parsonage-house and all other ecclesiastical edifices within the archdeaconry of Lewes, and to make their return to him or his vicar-general, of dilapidations, decays, want of repairs &c. (*a*).

The method which the ecclesiastical laws have prescribed to archdeacons, says Bishop *Gibson* (*b*), for the due discharge of their office, is parochial visitation, or the repairing personally to the church of every parish, and to the mansion-house of every incumbent: and the canons of 1603 expressly require that every archdeacon survey the churches of his jurisdiction once in every three years, or cause the same to be done (*c*); and wherever defects or dilapidations of any kind be found, the archdeacon hath power to enjoin reparation within a convenient time, upon pain of ecclesiastical censures, to which he is bound to proceed, in case of neglect or disobedience (*d*).

Power of  
deans, and  
deans and  
chapters, as  
to ecclesi-  
astical dila-  
pidations.

DEANS, *decani*, Latin, are the second dignitaries of a diocese, and have duties, second only to the bishop, in seeing the

suscepiant, domos ipsarum, et cætera ædificia negligunt, ita ut integra ea non conservent et diruta non restaurent; propter quod ecclesiarum ipsarum statum deformitas occupat, et multa incommoda subsequuntur: Statuimus et præcipimus, ut universi clerici suorum beneficiorum domos, et cætera ædificia, prout indiguerint, reficere studeant condecenter, ad quod per Episcopos suos vel Archidiaconos sollicitè, moneantur. Si quis verò post Episcopi vel Archidiaconi monitionem, per duos menses id facere contaverit, extunc Episcopus ipsius Clerici sumptibus, id fieri faciat, diligenter, de fructibus ipsius Ecclesiæ et Beneficii, præsentis auctoritate statuti; tantum accipi faciens, quantum ad refectionem hujusmodi sufficit peragendam.

“Cancellos etiam Ecclesiæ per eos, qui ad hoc tenentur, refici faciant, ut superius est expressum.

“Archiepiscopos verò, et Episcopos, et alios inferiores Prælatos, Domos et Ædificia sua sarta tecta, et in statum suo, conservare et tenere sub Divini Judicii attestatione præcipimus, ut ipsi ea refici faciant, quæ refectione noverint indigere.” OTHONONUS Leg. Const. Ed. Ox. p. 112.

(*a*) For a copy of this commission, extracted from the Registry of Chichester, see Appendix, No. XIV.

(*b*) Giba. Cod. Jur. Eccl. App. § 15. fo. 1552.

(*c*) Can. 86.

(*d*) Legatine Const. Otho. tit. 17, de dom. eccl. refic.

churches, parsonage-houses and other buildings belonging to the church, kept in due repair. They are called *deans*, *decani* from the Greek Δεκά, ten, because they were anciently chiefs over ten canons or prebendaries in a cathedral church (α).

The 86th canon of 1603 (b) (James 1.) for the purpose of the better prevention of *dilapidation* in churches, orders "that every dean, dean and chapter, archdeacon and others, which have authority to hold ecclesiastical visitations by composition, law or prescription, shall survey the churches of his or their jurisdiction, once in every three years, in his own person, or *cause the same to be done*, and shall from time to time within the said three years, certify the high commissioners for causes ecclesiastical every year of such defects in any of the said churches, as he or they do find unrepaired, and the names and surnames of the parties faulty therein. Upon which certificate, we desire that the said high commissioners will *ex officio mero* send for such parties and compel them to obey the just and lawful decrees of such ecclesiastical ordinaries making such certificates."

The dean and chapter of a diocese, says Dr. *Aylmer* (c), are the bishop's council, with whom he may consult on eccle-

(a) Aylm. Par. p. 199.

(b) The principal canons, injunctions or precepts to be observed in regard to ecclesiastical dilapidations, are contained in the injunctions of King James the 1st, Queen Elizabeth and King Edward the 6th, which still remain part and parcel of the ecclesiastical law of England. On the subject of these canons or the canon law, as they are generally called, the Lord Chancellor Hardwicke delivered his opinion in the case of Middleton v. Croft\*, saying "one consideration is, whether the authority by which those canons were made, can bind the laity

as to this matter. The authority whereby they were made is well known to have been by the bishops and clergy in convocation, convened by the king's writ, allowed to treat of, and made canons by the royal licence, and afterwards confirmed by the king under the great seal; but the defect objected to them is, that they never were confirmed by parliament, and for this reason, though *they bind the clergy* of this realm, yet they cannot bind the laity." Atkins's Reports, vol. ii. p. 66.

(c) Aylm. Par. p. 200.

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\* Vide Appendix, No. VIII.

siastical affairs. They are a spiritual corporation aggregate, which they cannot surrender without the bishop's leave, because he has an interest therein. As a corporation, a *dean and chapter* may hold lands, may sue and be sued, and if they commence an action, the defendant may challenge a juryman, who is of kindred to a prebendary, one of their body. They are guardians of the spiritualities during the vacancy of the bishop by common right, though the custom of our church, says the same authority, gives it to the archbishop; and, according to the 25th Hen. 8. c. 31, they have power as a dean and chapter in the vacancy of an archbishop to grant dispensations.

Statute of  
James 1,  
against dila-  
pidation.

In the 1st year of King James 1, an act (c. 3.) was passed against the diminution of the possessions of archbishopricks and bishopricks, and avoiding of *dilapidations* of the same. In this statute it is enacted that archbishopricks and bishopricks are of the foundation and patronage of the king, so as their possessions cannot be lawfully alienated to any subject, but must remain and continue in succession to the archbishops and bishops of this realm, and their successors, for the better maintenance of God's true religion, keeping of hospitality and *avoiding of dilapidations*. This act was passed, says Bishop Gibson (a), to frustrate an artifice of the courtiers of that day, who used to induce bishops, for certain considerations, to pass over such proportions of land to the *crown*, and then beg it of the crown for them, and their heirs for ever.

21 Hen. 8.  
c. 13.

The 21st Hen. 8. c. 13, the best provisions of which are re-enacted and confirmed by the 57th Geo. 3. c. 99, against non-residence, is pronounced by Sir Simon Degge (b) to be an excellent law, and that one of its principal ends is "*to avoid dilapidations* in the buildings belonging to their livings; for you shall seldom see a *non-resident*, but he is also a *dilapidator*; and it is no wonder that he who neglects the flock, lets the sheep-fold go to ruin."

(a) Gibs. Cod. Jur. Eccl. tit. xxix. — (b) Degge's Pars. Couns. part i. cap. 2.

By the *Provincial Constitutions* (a) of EDMUND, Archbishop of Canterbury, passed A. D. 1236, in the 21st Hen. 3, a rector or vicar endowed, leaving dilapidations; his goods are to be taken for restitution or re-instatement, in such proportions as the revenue of the church will bear (b).

The goods of rectors or endowed vicars, leaving dilapidations, are to answer.

SIMON MEFHAM, who was Archbishop of Canterbury in the reign of Edward 3, in the 3d year of that king's reign, enjoined, that ecclesiastical dilapidations were to be judged, only by credible persons on oath, and repaired according to the appointment of the diocesan (c): and *Lyndewode* in his *Gloss* on this constitution, explains the words "credible persons" (d) as persons versed in their art, and faithful to their trust (e): also *clergymen* (f) having skill in such matters; who shall swear (g),

Ecclesiastical dilapidations to be valued by credible persons on oath.

(c) For an account of these Provincial Constitutions and their authors, see *Architectural Jurisprudence*, pt. I. tit. iv. § 3.

(b) The original is as follows:—"Si rector alicujus ecclesiæ decedens domos ecclesiæ reliquerit dirutas, vel ruinosas; de bonis ejus ecclesiasticis tanta portio deducatur, quæ sufficiat ad reparandum hæc, et ad alios defectus ecclesiæ supplendos." EDMUNDUS\*, *Archiepiscopus*, in *Lyndewode*, Edit. Oxon. p. 250.

(c) "Statuimus, quòd nulla Inquisitio super defectibus domorum, aut aliorum ad beneficium Ecclesiasticum spectantium de cætero facienda, valeat in alterius præjudicium, nisi fiat per viros fide dignos in forma Juris juratos; ipso ad hoc, cujus interest, primitus evocato. Integram verùm æstimati-

onem defectuum in domibus, aut aliis ad beneficia ecclesiastica spectantibus repertorum, sive per inquisitionem, vel viam compositionis facta extiterit, loci diocesanus in reparationem ipsorum defectuum converti faciat, infra Terminum competentem ipsius arbitrio moderandum." SIMON, *Archiepis.*—*Prov. Const.* Edit. Oxon. p. 253.

(d) "Viros fide dignos." *Lyndewode*, lib. iii. tit. 27. c. 3.

(e) "Ut putà, artifices quibus, in his quæ ad artem suam spectant, fides adhibenda est." *Ib.*

(f) "Tam clerici quàm laici majorem in ea parte notitiam habentes." *Ib.* lib. iii. tit. 28. cap. 3.

(g) "Jurent se, non privato odio, neque amicitia, neque pro aliquo commodo quod habuerunt, vel habent, vel habituri sunt, deposituros." *Ib.*

\* EDMUND OF ASHMOND, was born at Abingdon, in Berkshire, and educated at Oxford. St. Edmund's Hall, in that University, was either founded by, or in honour of him. He became Canon of Salisbury, and on the death of Archbishop Wethershed, was advanced to the Archbishopric of Canterbury. He died in 1240, and added twenty-two canons to the Archbishopric Constitutions.

† *Lyndewode* (lib. iii. tit. 27. c. 3.) interprets these *other things*, to be inclosures, hedges, ditches and such like.

that they will truly make inquisition, without hatred or favour, or any interest which they have or shall have therein.

All ecclesiastical persons bound to repair their ecclesiastical buildings within two months after notice.

Cardinal OTHOBONUS in his before quoted *Legatine Constitutions*, says, we do ordain and establish, that all clerks shall take care decently to repair *the houses* of their benefices, and *other* buildings as need shall require; whereunto they shall be earnestly admonished by their bishops or archdeacons. And if any of them, after the monition of the bishop or archdeacon, shall neglect to do the same for the space of (a) *two months*, the bishop shall cause the same to be done at the costs and charges of such clerk, out of the profits of his church and benefice, by the authority of this present statute; causing so much thereof to be received as shall be sufficient for such reparation.

Chancels also to be repaired.

The same legate also enjoins, that the archdeacon shall cause chancels to be repaired, when they require it, by those who are bound thereunto (b). And as to archbishops, bishops and other inferior prelates, they are by the same constitution, enjoined to keep their houses and edifices in good and sufficient repair, *sub divini attestations judicii*; that is, says the learned commentator on the constitutions, under a sentence of eternal damnation at the last day of account, when the sheep shall be separated from the goats (c).

From this constitution of *Othobonus*, and from the Commentary by *Atho* thereupon, it is to be inferred, that an ecclesiastical person may be guilty of dilapidation or waste of

(a) "Si quis verò post episcopi vel archidiaconi monitionem per *duos menses* id facere cessaverit ex tunc episcopus ipsius clerici sumptibus, id fieri faciat diligenter, de fructibus ipsius ecclesie et beneficii, præsenti auctoritate statuti; tantum accipi faciens, quantum ad refectionem hujusmodi sufficiat perigendum." Constitutio Domini OTHOBONI, tit. xvii.

(b) "Cancellos etiam ecclesie per eos, qui ad hoc tenentur refici faciant ut superius est expressum." Const. Dom. Othoboni, tit. xvii.

(c) "*Sub divini attestations judicii*. Id est damnationis eternæ in extremo calculo, quando separabuntur oves ab hædis." Johannis de Atho.

his benefice, two several ways; namely, either by not keeping the edifices in good repair; or by not repairing them when they are gone to ruin and decay.

But that constitution chiefly relates to the mansion-houses of ecclesiastical benefices, and those not only of all parsonages and rectories, but also of all bishopricks and prebends: likewise to the houses of all other persons, having ecclesiastical livings, but not specifically, by the words of the constitutions, to their farm-houses and buildings, although they are also provided for by the *canon* law in case of dilapidations; and such as neglect the reparations aforesaid, may be presented and convicted thereof before the diocesan, who has power to sequester the fruits of such aforesaid benefice (*a*). For the fruits thereof are, as it were, in legal construction, tacitly or by assumpait, mortgaged by a kind of privilege for such indemnity (*b*); and for that reason the bishop is empowered in some cases to sequester the same for that end.

Archbishop *Edmund*, in his before-mentioned canon, made in the 18th of Henry 3, enjoins that if a rector of a church shall leave the houses of the church, by which, says *Lyndewode* (*c*), in his *Commentary*, are meant such as the manse of the rectory or vicarage, and other edifices, of which the building or repairing belongs to the incumbent, ruinous or decayed, so much shall be deducted out of his ecclesiastical goods as shall be sufficient to repair the same, and to supply the other defects of the church.

This constitution makes provisions, it is true, against dilapidations generally, but the canon above cited, provides rather

(a) "Hic est arg. quod in illis qui per negligentiam tam talia permittant colabi, de dilapidationibus possunt merito accusari: ergo hoc posset esse una causa quare fructus sui beneficii licite valerent sequestrari." Joh. de Athon. Com. D. Othoboni, in v. *Cessaverit*.

(b) "Unde hic nota fructus ecclesie pro refectione hujusmodi dormorum per ordinarium licite sequestrari." Ib.

(c) "*Domes ecclesie*. Ut puta, mansum rectorie, vel vicarie, et alia edificia quaecunque, quorum ædificati sive reparatio spectat ad ipsum rectorem immediate." *Lyndewode*, lib. iii. tit. 27. cap. 1.

trators, shall be, and are indemnified as to the rebuilding of their respective chancels, parsonage and vicarage-houses; and shall not be liable to any suits, troubles or molestations, that may arise for dilapidations aforesaid: and that no process shall be issued out of any court whatsoever, against the persons aforesaid, for their not rebuilding their respective chancels and parsonage and vicarage-houses; any law or statute to the contrary, in anywise notwithstanding."

I have quoted this statute, although I conceive that its powers are expired, only relating to the rebuilding of their chancels and parsonage and vicarage-houses, and not to the keeping of them in repair, because in two cases in which I have been engaged, in churches that were burned down at the fire of London, the incumbents have claimed the benefit of exemption from repairs; one of the chancel and the other both of chancel and the parsonage-house.—They were neither decided as to the law, a compromise being made as to the one, and the other is still at issue. Moreover Bishop *Gibson*, prints it (a) as a statute whose powers are still in existence. In any future case, so circumstanced, I shall act as if the statute were temporary, as I think it was, that a sufficient authority may decide.

Churchwardens to prevent dilapidations in churches;

By the 85th of the canons of 1603 (b) it is ordered that the churchwardens or quest-men shall take care and provide that the churches (that is, such parts of them as by ancient custom belong to the parishioners in point of repairs, except the chancel and private aisles and chapels belonging to private persons) be well and sufficiently repaired, and so from time to time kept and maintained; that the windows be well glazed, and that the floors be kept paved, plain and even; all things there in such orderly and decent sort, without dust, or any thing that may be noisome or unseemly, as best becometh the house of God, and is prescribed in an Homily to that effect.

and also to fences &c. of the churchyards.

They are also commanded to take the like care, that the church-yards be well and sufficiently repaired, fenced and main-

(a) Gibs. Cod. Jur. Eccl. App. p. 1226.

(b) 1st Jac. 1.

tained with walls, rails or pales, as have been in each place accustomed, *at their charges unto whom by law the same appertaineth.*

By the constitution of Archbishop *Winchelsea*, passed A. D. 1305, 33 Edw. 1. the chancels of churches are to be repaired by the incumbent, or other to whom the repairs belong. In the case of *Pense v. Prouse* (a) a prohibition was moved for, in behalf of one who was libelled for a rate assessed by the churchwardens *by custom* for the repair of the church; as well the *chancel*, as the *nave* of the church. It was resolved, *that the parson ought to repair the chancel and not the parishioners*; but *that the parishioners ought to repair the nave of the church*; and, this according to *Holt*, *by the custom of England*; but, as he added *by the custom of London* the parishioners are to repair the *chancel* also.

Incumbents  
liable to dila-  
pidations of  
chancels

But not in the  
city of Lon-  
don.

The chancel has been held by some jurists to be the only freehold that the parson has, but the whole church and glebe is more properly held to be his freehold, although custom has in some instances, like the custom of London as above mentioned, exonerated him from the repairs and liabilities for dilapidations.

The incumbent is chargeable with the repairs of the *chancel*, as above mentioned, not only in respect of the profits which he receives from burying therein; but also in respect of the canon law, which obliges him to repair the whole fabric of the church. And it was the opinion of the judges of the Common Pleas, that the Spiritual Court may grant sequestration upon an *impropriate parsonage* for not repairing the chancel of the church. But it is a question with some, whether such process may be obtained for not repairing the dilapidation of a parsonage-house. Dr. *Ayliffe* (b) gives it as his opinion that a sequestration will not only lie for dilapidations of the *chancel*, but for the *manse* or parsonage-house also. And it

(a) Raym. Rep. vol. i. p. 59.

(b) Ayliffe's Parergon, p. 459.



is said that the Spiritual Court may excommunicate the impropiator for both, notwithstanding the Statute of Dissolutions. But though *custom* has discharged the parson, as before mentioned, from paying towards the repair of dilapidations to the *nave* of the church, on his repairing the *chancel*; yet this custom does not exonerate him from taking care that both the chancel and the church be kept free from dilapidations (a).

The reverend and learned Dr. *Humphry Prideaux*, Archdeacon of Suffolk in 1701, says, on a visitation, "As to repairs, the church and church-yard are of the freehold of the minister; but because the parishioners have the use of the body of the church to hear divine service in, and of the church-yard to bury their dead, they are bound to the repair of both; but, *the repair of the chancel still remains upon the parson, unless in such vicarages where the vicar by special composition is bound thereto.*"

*William*, Bishop of St. Asaph, in 1710, adds an exhortation and commentary to each of his articles of inquiry on his visitation; and observes, that "Through the evils of non-residence, I can think of applying no other remedy for these evils past, but warning those who are concerned, to take more care for the future, of their houses; that they suffer them not for want of a little charge and care at present, to grow daily worse and worse, till at last they come to such a pass that they despair of mending them, and the next successor finds them on the ground, and is neither able to build them himself, nor recover any thing towards the doing it, from a poor helpless widow or insolvent executor. By these means," says his lordship, "a tolerable house becomes a mean one, and a mean one falls into total ruin."

Opinion of the Bishop of St. Asaph on dilapidations by the clergy.

In the 14th article of the same venerable prelate's visitation inquiry, he asks, "Is the house of your rector or vicar, with the barns, stables and all the out-buildings, kept in good repair?" and says, "I have already spoken to the keeping

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(a) Ayl. Parer. p. 458. Arg. digest. lib. viii. tit. 2. cap. 21.

the incumbents houses in good repair: But I can pass by no opportunity of insisting again upon it; it is so fit, so reasonable, so just and necessary a tie upon all clergymen, that if they have any sense of honesty, or gratitude to their religious founders and benefactors, they will carefully discharge their obligation, and have the same regard to their successors, which their predecessors had, or should have had to them. By our ecclesiastical law the bishops are required, to put the clergy in mind of keeping their houses in sufficient reparations. But what if they neglect to do as they were bid? Why, if they do not do it in two months time, the bishop is to take care, by sequestration of their benefices, that it be done out of their profits. Othobon. fo. 55. 2. But to save the bishop and the incumbent the trouble, it were much better the clergy would follow the injunctions of King Edward Sixth in 1547, and the same repealed by Queen Elizabeth in 1559, and set aside the fifth part of their clear revenue for this purpose, till all were finished, and afterwards to maintain them in good condition, which a much less proportion would do. It has been resolved by the judges in the King's Bench in the 12th year of King James the First, that dilapidation is a sufficient cause of deprivation. I should be loth" continues the bishop, "to find a man fit to be made an example of this kind; but truly I intend to look with much less pity on this fault, than on many others; because I see that pity to the present incumbent may very easily become cruelty to his widow, if she be sued by his successor, and he recovers damages of her; or great hardship to that successor, if he recovers none, and finds his house in a ruinous condition."

The rules of common law, says Bishop Gibson (a), concerning the repairs of the chancel, and the seats therein are, I. *The parson is bound to repair the chancel*: not because the freehold is in him, for so is the freehold of the church; but by the custom of England (b), which hath allotted the repairs of the chancel to the parson, and the repairs of the

Opinions of Gibson, Bishop of London, on the same subject, and the rules of common law as to ecclesiastical dilapidations.

(a) Gibs. Cod. Jur. Eccl. tit. ix. cap. 5.

(b) See the before quoted constitution of Cardinal Othobonus, p. 24.

church to the parishioners. Yet so, that if the custom had been for the parish, or the estate of a particular person, to repair the chancel, that custom shall be good; which is plainly intimated by *Lyndewode* (a), as the law of the church; and is also confirmed by the common law, in the books of Reports (b). But as to the obligation resting upon the parson or upon the vicar, he says, that the books of common law say nothing; and so, it is wholly left upon that footing, on which the law of the church has placed it (c).

Parishioners  
to judge of  
order and de-  
cency as to  
repairs.

In the case of *Newson* and *Baldry* reported by *Farresley* (d), in the first year of Queen Anne, the facts were, that the communion table was *ab antiquo* placed in the chancel; that there were ancient rails about it, which were out of repair; that the parishioners at a meeting, had resolved to repair the chancel and rails, and to replace the table there, and raise the floor some steps higher, for the sake of greater decency; and, upon refusal to pay the rate, and a prohibition prayed, the court was inclined to think, that the parishioners might do these things; because they are compellable to put things in decent order, and because, as to the degrees of order and decency, there is no rule, but as the parishioners, by a majority, do agree.

The point, whether the parishioners could make a rate to repair the chancel, was also moved, and such a case alleged, between *Rose* and *Hawkins* in the 9th William 3. in which a prohibition had been granted; but in the present case, that point had not been tried below, and, therefore, the court said it was not before them.

Impropriators  
also bound to  
repair chan-  
cels, and liable  
to dilapida-  
tions therein.

II. As rectors or spiritual persons, says the same authority (e), so also IMPROPRIATORS, are bound of common right, to repair the chancels. This doctrine, under the limitations before expressed, is clear and uncontested, and the only diffi-

(a) In his Gloss. on the same constitution.

(b) Ventr. Rep. vol. ii. p. 239. Mod. Rep. vol. v. p. 389.

(c) Lyndewode, as above.

(d) Mod. Rep. by Farresley, pt. vii.

p. 69.

(e) Gibs. Cod. Jur. Eccl. tit. ix. c. 5.

only, says the bishop, is in what manner they shall be compelled to do it. Whether by (a) spiritual censures only, in like manner as the parishioners are compelled to contribute to the repairs of the church, since impropriations are now become lay-fees; or whether by sequestration, (as incumbents, and, as it should seem, spiritual impropriators of all kinds may be compelled;) since impropriations, before they became lay-fees, were undoubtedly liable to sequestration; since the king was to enjoy them, in the same manner as the religious had done, and nothing was conveyed, but what the religious enjoyed, that is, the profits *over and above* the providing divine service, *repairing the chancel*, and other ecclesiastical burthens, and since the general saving (b) of all rights which any person had before, may well be extended to a saving of the right of the ordinary in this particular; which right he undoubtedly had by the law and practice of the church, not abrogated, so far as had come to his knowledge, by any statute whatever.

This point was twice under the consideration of the courts, in the reign of Charles 2. anno 22 & 29; in the first of which it is said (c), that the court *inclined*, that there could be no sequestration; and in the second, notwithstanding the foregoing arguments, the whole court, besides Justice *Atkins*, held that the lay-impropriator was not to be sequestered.

Besides what has been already said, the learned prelate adds the following observations:—1. That although, as was expressly alleged, this power had been frequently exercised by the Spiritual Courts, no instances appear before these of any opposition made. 2. That, in both instances, *judgment* was given, not upon the point or matter in hand, but upon errors found in the *pleadings*. 3. That one argument against the allowing the Ordinary such jurisdiction, was *ab inconvenienti*, that such allowance would be a step towards giving ordinaries a power to *augment vicarages*; as they might have done, and frequently did, before the Dissolution.

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(a) Ventr. Rep. vol. ii. p. 35. Mod. (b) 31 Hen. 8. c. 13.

Rep. part i. p. 258; part ii. p. 254.

(c) Gibs. Cod. Jur. Eccl. tit. ix. c. 5.

Repairing the  
chancel exonerates from re-  
pairing the  
church.

III. *Repairing of the chancel*, says Bishop Gibson (a), is a discharge from contributing to the repairs of the church. This is supposed to be the known law of the church, in the Gloss of *John de Athon*, upon the legatine constitutions of OTHOBONUS; where speaking of the repairs of the church, he gives his opinion to the same effect (b). The bishop concludes this to be also evident from the ground of the respective obligations upon the parson and parishioners to repair, the former the chancel, and the latter the church; which was evidently a division of the burthen, and by consequence a mutual disengaging of each other, from that part which the other took. And therefore, as it was declared by the Court of King's Bench, Michaelmas Term, 18 Jac. 1. in the case of *Serjeant Davies* (c), that there could be no doubt but the impropriator was rateable to the church for lands which were *not* parcel of the parsonage, notwithstanding his obligation as parson (d) to repair the chancel. So, when this plea of the farmer of an impropriation, to be exempt from the parish rate for repairing the dilapidations of the church, because he had repaired, and was liable to those of the chancel, was *refused* in the Spiritual Court, it must probably, says Bishop Gibson, have been a plea offered to exempt *other* possessions also, from church rates.

Spiritual dignities to be kept free from dilapidations &c.

Spiritual dignities, says the above authority (e), in time of vacation, are to be kept free from dilapidations and waste; and cites the statute of the 3d Edw. 1. (Westm. 1.) cap. 21. A. D. 1275, which enacts that certain things shall be kept and sustained, "and in the same manner shall archbishopricks, bishopricks, abbeies, churches and all spiritual dignities be kept in time of vacation. To which the bishop adds in a note, that it belonged *de jure communi*, to the dean and chapter of

(a) Gibs. Cod. Jur. Eccl. tit. lx. c. 5.

(b) In his Gloss, on the words "*Ad hoc tenentur*," he says, "*Licet enim, per consuetudinem, exoneretur rector à sumptibus præstandis; non tamen eximitur à curâ et sollicitudine impendenda*"—which a little farther on he explains, by adding "*Audiet ergò*

rector computum expensarum circa hujusmodi Fabricam, et etiam legatorum ad usum Fabricæ relictorum et omnium consilium."

(c) Appendix, No. X.

(d) Keb. Rep. vol. ii. pp. 730 & 742.

(e) Gibs. Cod. Jur. Eccl. tit. xxix. cap. 3.

a diocese, as well the care of *the possessions*, as of the jurisdiction of vacant sees (*a*). But, more anciently, the care of *the possessions* was in the hands of a particular person, called *Œconomus*, or steward, who was a standing officer in every church, for the administration of the revenues, according to the order of the council of *Chalcedon*, and divers other succeeding councils (*b*). And, since the ancient canons for the *speedy* filling of vacant sees, are not in force here, it were to be wished, says his lordship, that some sure method could be fixed and established, for preserving palaces, gardens, orchards and demesne lands, in as good a state as they are left by the preceding bishop, and from those dilapidations and destructions which are oft times occasioned by long vacancies.

By a provincial constitution of Archbishop *Mepham* (*c*), it is ordained, in order that they who spoil or dilapidate the houses or estates of ecclesiastical persons may not escape unpunished, through the difficulty of citing them; that if they cannot be cited personally, nor have any known dwelling, they may be cited in the parish church or cathedral, and whether they be found or not, they shall be proceeded against in the place of the offence—credit being given to the person citing, that the citation was due, and all the judges are commanded to assist one another.

Dilapidators of ecclesiastical houses, may be publicly cited in the church, if they cannot be found.

By the statute 12 Charles 2. c. 11. it is provided, that this act of his majesty's most gracious, free and general pardon "shall not extend to any person or persons whatsoever who have entered into any messuage, lands, tenements and hereditaments, called *fabrick lands*, or possessed themselves of any rent or revenues given for the *repair* of any cathedral or other church, or who have sacrilegiously enriched themselves by converting the plate or utensils, and *materials*, of, or belonging to any such churches, to their own private use and advantage, for or in respect of the said crimes only.

Persons misapplying materials of ecclesiastical buildings excepted out of general pardon.

(a) Sext. decr. lib. 1. tit. vi. cap. 40.  
Lyndewode, on the constitutions of  
Boniface.

(b) Chalc. 25. 2. Later. 5. Rem. 3.  
Vaur. 53. 56.

(c) 3 Edw. 3. A. D. 1328. Lyndewode, Edit. Oxon. p. 89.



Prebendaries liable to dilapidations for houses, even if not annexed to the prebendal stall.

A prebendary leaving *a house*, by death or cession, out of repair; he or his executors shall be liable to *a suit of dilapidation* (*a*), although it was not annexed to the prebendal stall. This was declared by the Court of King's Bench, in the 35th Charles 2. in the case of *Dr. Sands* (*b*), against the executors of his predecessor, the residentiary prebendary in the church of Wells, where the bishop appoints to each prebendary what house he thinks fit. For although the house is not *parcel* of any particular prebend, it *must* be assigned to some particular prebend; and when it *is* so assigned, it is part of the prebend; therefore prohibition to the Spiritual Court was not granted.

Long leases being the cause of dilapidations, prohibited.

Long leases being often the cause of dilapidations, it was enacted by the statute 13th Elizabeth, c. 10. "and for that long and unreasonable leases made by colleges, deans and chapters, parsons and vicars, and other having spiritual promotions, be the chiefest cause of the dilapidations, and the decay of all spiritual livings and hospitality, and the utter impoverishing of all successors incumbents of the same; that from henceforth (*c*) all leases, gifts, grants, feoffments, conveyances or estates to be made, had, done or suffered by any master and fellows of any college, dean and chapter of any cathedral or collegiate church, master or guardian of any hospital, parson, vicar or any other having any spiritual or ecclesiastical living, or any houses, lands, tithes, tenements or other hereditaments, being any parcel of the possessions of any such college, cathedral church, chapel, hospital, parsonage, vicarage or other spiritual promotion, or any ways appertaining or belonging to the same, or any of them, to any person or persons, bodies politic or corporate (other than for the term of one-and-twenty years, or three lives, from the time as any such lease or grant shall be made or granted, whereupon the accustomed yearly rent or more shall be reserved and payable yearly during the said term) shall be utterly void and of none effect, to all intents, constructions and purposes; any law, custom or usage to the contrary anyways notwithstanding."

(a) Gibs. Cod. Jur. Eccl. tit. viii. cap. 3.

(b) Appendix, No. XI.

(c) A. D. 1571.

On such long and unreasonable leases Bishop *Gibson* says (a) in his learned commentary on this act, that corporations aggregate might always let such leases without confirmation; and so might sole corporations, with confirmation, until this act was made; as none but bishops were restrained by the statute of the 1st Eliz. But by this statute, all other corporations, sole and aggregate, are put under the same restraints that bishops were; and the two acts were of the same tenor and form.

With regard to the meaning of masters and fellows, it includes, according to Lord *Coke's* opinion, in the case of the *Master and Fellows of Magdalen College, Cambridge* (b), all colleges, by what name soever incorporated, and of what nature soever the foundations be, *ecclesiastical, temporal, or mixed*; the statute being construed as that great lawyer enjoins most *largely* and *beneficially*, against those destructive leases.—For the same reason, although the act says “*dean and chapter*,” it extends (c) to chapters where there are no deans, and though it is said, “*master or guardian of any hospital*,” yet it extends to all manner of hospitals, by what name soever they may be incorporated.

Extends to all manner of ecclesiastical persons.

(a) *Gibb. Cod. Jur. Eccl. tit. xxxi. cap. 4.*

(b) Appendix, No. IX. Wherein this profound lawyer says “le dit act de 13 Eliz. ad ce tous foits construe beneficialment a prevenir tous inventions & evasions encontre le voier intention de mesme act; come appiert la per divers resolutions le report. Et ainsi que souvent foitz ad ce tenu, que ou le statnte dit maister et fellowes dascun colledge, soit le college incorporate p m le nom, ou per le noime de gardian & fellowes, ou gardian & schollers, ou garden, fellowes & schollers, ou maister & schollers, ou provost, fellowes et schollers, ou per

ascun noime de corporation, et soit le colledge temporall pur advancement de liberal arts and sciences, ou a educater jeunes in bone literature, ou mere ecclesiastical, ou mixt, chascun tiel colledge est deins le provision de cest act: mesme la ley ou le statute dit maister ou gardian dascun hospital, soit le hospital enccorporate per ascun autre noime, ou soit ceo un sole corporation, ou corporation aggregate de plusieurs, le statute, extend a tous maners des hospitalz et sic de ceteris, car cet act tous foitz ad ewe benigne et favorable construction.” Lord *Coke's* Reports, part xi. p. 76.

(c) *Mod. Rep. part i. p. 304.*



This is a general law and concerns all the clergy.

With regard to the words "*or any other*," it has often been declared and adjudged (*a*), that this statute is a *general* law as it concerns *all* the clergy, though at first much doubted. But it was always agreed, notwithstanding this general clause, that bishops were not included, because the statute begins with an order of the clergy *inferior* to them (*b*). Concerning *person* or persons &c. that are comprehended in this restriction from taking long leases, it was for some time after the passing of this statute taken, says Bishop *Gibson*, in practice at least, that the king was not so comprehended, but that long leases might be let to *him* as before; and in fact some such leases were accordingly let. But it was resolved (*c*) in the parliament held in the 43d year of Queen Elizabeth, by Chief Justices *Popham* and *Anderson*, and other justices, assistants to the lords in parliament, that the *Queen* was restricted by this act, of which my Lord *Coke* has made a report in his fifth book, in the case of ecclesiastical persons; which resolution of the judges, says Lord *Coke* (*d*), was allowed by the lords and commons in parliament. One exception is made in these words, "other than conveyances, or estates had or made, by any ecclesiastical person or persons, bodies politick or corporate, not having power or ability by the laws of the realm, to make the same." To the same point, in the 1st year of King James 1. when a motion was made in parliament, upon the bill then depending, and afterwards passed (*e*) into an act, that the *clergy* as well as bishops, might be restrained from alienating &c. to the crown, it was again resolved by the justices' assistants, that they were *already restrained* by this statute; and for that reason were left out of the said bill.

As to the leases, the covenants of which are such guides in the estimation of the damages done by dilapidation, which

(a) Co. Rep. part iv. p. 76, &c.

Mod. Rep. part i. p. 205. Saville's Rep. p. 129.

(b) Gibs. Cod. Jur. Eccl. tit. xxxi. cap. 4.

(c) Co. Rep. part xi. p. 75 b.

(d) Appendix, No. IX, case of Magdalen College.

(e) 1 Jac. 1. c. 3, entitled "An Act against the diminution of the possessions of archbishopricks and bishopricks, and for avoiding dilapidations of the same."

through mistake, had been let by deans and chapters to the King, *after* the making of this statute; the law (*a*) favorably supposed, that the King's assignees could not understand such doubtful points; and so upon composition made with deans and chapters the leases were made good to them by decrees in chancery.

Concerning the terms "other than for the term of one-and-twenty years or three lives," although ecclesiastical *corporations aggregate* says Bishop *Gibson* (*b*), are not within the statute 32 Hen. 8. c. 28. yet is that statute a *pattern* for leases by them made, in many things not herein specified. And as to leases made by a *sole corporation*, as bishop, archdeacon, prebendary &c. according to this statute; they are not good without confirmation, unless they be also made according to the limitations of the statute 32 Hen. 8. c. 28.

In regard to the accustomed rent, mentioned in this statute, it was held by Lord Chief Justice *Hale*, as reported by Sir *Thomas Hardres* (*c*), that *the accustomed rent* mentioned in this statute and in the 1st Eliz. c. 19, ought to be understood of the rent reserved upon the *last* lease, and not upon the *first*; for that rent having been altered since, cannot be called the accustomed rent.

In the statute 27 Hen. 8. c. 28, it provides, § 2, that it does not extend to any lease made without impeachment of waste, or for above twenty-one years or three lives; for if a lease be made for life, the remainder for life &c. this is not warranted by the statute, because, says Bishop *Gibson* (*d*), it is *dispunishable* of waste. But if a lease be made to one during three lives, it is good, because the occupant, if any happen, shall be punished for waste.

Although this condition of a good lease, is not *expressed* in the statute of the 1st Eliz. c. 19, on the leases of bishops,

(a) Roll. Abr. vol. i. p. 378.

(c) Hardr. Rep. fo. 1693, p. 326.

(b) Gibs. Cod. Jur. Eccl. tit. xxxi.

(d) Gibs. Cod. Jur. Eccl. tit. xxxi.

cap. 4.

cap. 2. Co. 1st Inst. fo. 446.

Lessees for  
lives punish-  
able for waste.

and the 13th Eliz. c. 10, on the leases of the clergy, yet are both bishops and clergy says Bishop *Gibson* (a) restrained by the *equity* of the said statutes from making leases dispunishable of waste: for says my Lord *Coke* (b) concerning the 13th Eliz. c. 10, that "the statute was made against unreasonable leases; and it is unreasonable, that a lessee shall at his pleasure do *waste* and *spoil*; which holds equally in the case of *bishops*, upon the statute of the 1st Eliz. c. 19."

This was decided in the case of *The Bishop of London v. Web*, wherein a long lease had been made by Bishop *Bonner* in the time of Edward 6, *without impeachment of waste*, and *Web* made great profit, by digging of *brick-earth* upon the premises.

In united parishes, the parishioners of both to repair dilapidations to churches.

As the statute of the 17th Charles 2. c. 3, called *An act for uniting churches in cities and towns corporate*, made no provision as to repairs of dilapidations in churches, a new statute was passed in the 4th of William and Mary, c. 12, which enacts that where any churches heretofore have been, or hereafter shall be, united by virtue of the said act, and one of the churches so united, was, at the time of such union, or shall afterwards be demolished; that in all such cases, as often as the church which was or shall be made the church presentative, and to which the union was or shall be made, shall be out of repair, or there shall be need of decent ornaments for the performance of divine service therein, that the parishioners of the parish whose church shall then be down or demolished, shall bear and pay towards the charges of such repairs and decent ornaments, such share and proportion as the archbishop or bishop that shall make such union, shall by the said union direct and appoint; and for want of such direction and appointment, then one-third part of such charges of the repairs and decent ornaments which shall be made or provided; and the same shall be rated, taxed and levied, and

(a) *Gibs. Cod. Jur. Eccl. tit. xxxi. c. 2. Co. 1st Inst. fo. 44 b.*

(b) *Co. Rep. part vi. fo. 37 a.*

in default thereof such process and proceedings shall be had and made against him or them, as if it were for the reparation and finding decent ornaments for their own parish church, if no such union had been made; any law, custom, usage or opinion to the contrary heretofore notwithstanding.

But if both churches be *standing*, says Bishop Gibson (a), then the repairs of dilapidations and ornaments shall be provided for, as they were at common law; that is, by the parishioners of each parish respectively.—It has also been decided by the courts (b) that two churches parochial being united at common law, *the reparations* shall remain several, as before. Which was the reason why this particular statute, of 4 W. & M. c. 12, was found necessary to make it otherwise in the churches that had been or should be united in virtue of the preceding act of 17th Charles 2. c. 3, for before that, the inhabitants even of a *demolished* church, were not obliged to contribute to the reparations and support of the church remaining to which they were united.

Of *chapels* subject to a *mother-church*, some, says Dr. Gibson (c), are merely *chapels of ease*, others *chapels of ease* and *parochial*. The repairs of the dilapidations of a chapel are to be done, says the same authority (d), by rates on the landholders within the chapelry, in the same manner as the repairs of a church, and consequently there are the same remedies for dilapidations; and such repairs and rates are to be also enforced by ecclesiastical authority. But the repairing of the chapel is, of itself, no discharge from contributing to the repairs of the mother-church, which though at first sight it may appear hard, hath this good foundation of reason; that all chapels, and all discharges from attending divine service at the mother-church were originally matters of *grace* and *favour*; and that the ease or convenience of particular inhabitants, ought not to be purchased with inconvenience and

Who are liable to dilapidations of chapels?

(a) Gibs. Cod. Jur. Eccl. tit. xxxviii. cap. 1.

(b) Heb. Rep. p. 67.

(c) Gibs. Cod. Jur. Eccl. tit. ix. cap. 11.

(d) Ibid.



damage to the *mother-church*; in whose right it was specially provided on those occasions, that nothing should be done, *per quod præjudicium fieri poterat matriæ ecclesiæ* (a).

Except where custom is proved to the contrary.

But where a custom can be proved to the contrary, the Temporal Courts can give relief, as to the inhabitants of a parochial chapelry as in the case of *Brown v. Palfry* (b), wherein the plaintiff prayed a prohibition to the Ecclesiastical Court of Durham, suggesting that they were a parochial chapel within another parish of Northumberland, and that the inhabitants of the chapelry had had time out of mind a parochial chapel and divine service, sacraments &c. and also *had used to be exempt* from the repairs of the parochial church, bells &c. in consideration of their being charged to the repair of their own chapel, and that they have usually repaired the same; and yet the defendant, as churchwarden of the parish church sued them to repair the said church, the parish-bells &c. and the prohibition was granted (c).

In another similar case, that of *Wise v. Creeke* (d), wherein a prohibition was prayed, of the Court of King's Bench, to stay a suit in the Spiritual Court by the churchwardens of Adderbury in the county of Oxford against the inhabitants of *Bodicut, a village within the parish of Adderbury*, suggesting that they have a *chapel parochial*, and *rights parochial*, and *ratione inde* have time out of mind been discharged from repairing the parish church. The court granted a *prohibition*, but ordered the plaintiff to declare thereupon, that the matter might come judicially in debate, whether such custom be good or not.

A prohibition will not lie against the Courts Spiritual for dilapidations of churches, church-yards &c. as being matters purely ecclesiastical.

If a prelate punishes or sues any person in the Ecclesiastical Court, for non-repairs or dilapidation of church-yards, a writ of prohibition from the Temporal Courts will not lie against him. In the *Responsionibus Regiis*, a decree of the King,

(a) Gibs. Cod. Jur. Eccl. tit. ix. c. 11.

(b) Lev. Rep. part ii. p. 108.

(c) Appendix, No. XII.

(d) Appendix, No. XIII.

in the *Provincial Constitutions* (a), the judges are directed not to forbid the prelates from punishing certain crimes; amongst which are the following expressions; “item si prælatus puniat pro Ecclesiâ non factâ, Cæmeterio non clauso, Ecclesiâ discoöpertâ, vel non decenter ornatâ” &c. and the statute “*circumspecte agatis*” made in the 13th year of Edw. 1. A. D. 1285, in which certain cases are enumerated, wherein the King’s prohibition doth not lie, recites that “The King to his judges sendeth greeting. Use yourselves circumspectly in all matters concerning the *Bishop of Norwich* and his clergy; not punishing them, if they hold plea in Court Christian of such things as be mere spiritual, that is, to wit” enumerating many crimes, and then continuing, “also, if prelates do punish for leaving the church-yard unclosed, or for that the church is uncovered, or not conveniently decked, in which cases none other penance can be enjoined but pecuniary.”

By this statute the bishops are empowered to compel repairs of ecclesiastical dilapidations, or of enforcing pecuniary fines, for non-performance or neglect of such duties, in their own courts. Ecclesiastical dilapidations punishable in the Ecclesiastical Courts.

Bishop *Gibson* in (b) a note upon the salutation clause of this act, says “Although this is only directed by the King to the *Bishop of Norwich*, and some have suggested that it was made by the prelates themselves; yet my Lord *Coke* (c) owns, that it was proved by their books to be a statute, and that it extendeth to all the bishops within this realm; the Bishop of Norwich being put for example.” And to set that matter beyond all doubt, it is expressly by name called a statute in the 15th section of the 2d & 3d Edw. 6. c. 13.

Among other duties enumerated by Bishop *Gibson* (d) in his instructions for the deans rural, are, that they are likewise, as occasion shall require, to inspect the churches, chancels Rural deans also enjoined to report ecclesiastical dilapidations.

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(a) Lyndewode, Edit. Oxon. fo. 96.

(c) Co. 2d Inst. fo. 487.

(b) Gibs. Cod. Jur. Eccl. tit. xlv.  
cap. 3, n.

(d) Gibs. Cod. Jur. Eccl. App. § 15,  
No. XIX.

and chapels, and the houses belonging to the parsons and vicars within his district, and to give information of their decays and dilapidations to the ordinary.

Matters concerning ecclesiastical dilapidations to be inspected in a parochial visitation.

Bishop *Gibson* (a) in his articles and directions in order to a parochial visitation, has the following heads concerning ecclesiastical dilapidations, which are extracted as being equally serviceable to the ecclesiastical surveyor and architect, and the clergy of all ranks.

### I. THE CHURCH and CHANCEL.

1. AS TO THE FABRICK.—*Covering and roof*; to see that they be good, and secured against rain. *Walls and doors*, that they be firm, and the walls well plastered. *Windows*, that they be well glazed. *Floor*, that it be paved, plain and even.

### II. FURNITURE.

*Seats, pulpit, reading-desk, font of stone, communion table, chest with three locks and keys for the register book and other papers, bells and bell-ropes, bier for the burial of the dead*; that all these be firm, convenient and in good order.

### III. THE CHURCH-YARD.

That it be well and sufficiently repaired, fenced and maintained, with walls, rails or pales, as have been in each place accustomed; that it be also kept clean and decent; and that the trees growing therein, be duly preserved and ordered, for the security of the church and church-yard.

### IV. THE MANSION-HOUSE

*Of the rector, vicar or curate; with the other houses, buildings and fences thereunto belonging.*

That all of them be kept in good and sufficient repair; and particularly, that *the mansion or dwelling-house*, over and above the repairs which are deemed *necessary*, be kept in

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(a) *Gibbs. Cod. Jur. Eccl. Appendix*, § 15, No. XIX, fo. 1553.

such (a) decent manner, as is suitable to the condition of the said rector, vicar or curate.

The incumbent and churchwardens, are to accompany the archdeacon on such visitations, after meeting him at and inspecting the church, to the *mansion-house* belonging to the said incumbent; and that, together with the other buildings and the fences, to be in like manner particularly viewed and inspected.

The incumbent and churchwardens, as respectively they may be concerned and obliged, are next to be *admonished* to repair the dilapidations and other defects, within such time as shall then and there be assigned by the archdeacon.

When these are re-instated or otherwise repaired, the incumbent and churchwardens, are to *certify* under their own hands, and the hands of two or more substantial parishioners, at the next *general visitation* of the archdeacon, or within such other time as he shall judge fit and reasonable, that the dilapidations and other defects are accordingly repaired.

The certificate so made, is to be entered in the acts of the archdeacon's visitation, with reference to the former entry of the said dilapidations or other defects.

In case such certificate is not returned at the time appointed, then the incumbent or churchwardens, as respectively concerned, are to be proceeded against by ecclesiastical *censures* and *penalties*, until the said dilapidations and defects shall be repaired, and a certificate returned, in the form and manner before directed.

Among the examples given by Bishop *Gibson* in his learned and elaborate work, on the statutes, constitutions, canons &c. of the church of England, which may be referred to by the

Examples of remedies for ecclesiastical dilapidations.

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(a) "*Reficere studeant condecorar.*" Othob. tit. 17, de dom. eccl. reficiend.



ecclesiastical architect and surveyor for precedents, are the following; namely, One, where *Walter Reynolds*, Archbishop of Canterbury, one of the authors of the *Provincial Constitutions*, being informed of dilapidations being left by the Bishop of Litchfield and Coventry, issues his commission to inquire and report upon the same (*a*).

Another is where a commission having been issued to view an episcopal palace, and a return being made by the commissioners, how it could be ordered for the best, a licence or faculty to take down and rebuild the same was accordingly granted (*b*).

A third is, the return reciting the archbishop's commission, setting forth the obligations upon incumbents to employ all monies received for dilapidations within a year; and in other cases to repair within two months after notice, upon pain of sequestration. Notwithstanding which, several incumbents neglected to repair, and therefore he requires them to be admonished to do it upon pain of sequestration. The names of the incumbents so admonished are given in the latter part of the return (*c*).

A fourth is, where a complaint having been made of dilapidations left by the incumbent's predecessor, a commission is issued by the Archbishop of Canterbury to inquire into and report upon the same (*d*).

The next is, the archbishop's commission recites, that a canon of the cathedral church of Wells, had complained of dilapidations left by his predecessors in a certain farm, and that the executors had in their hands sufficient assets to make reparation, but refused. Whereupon the archbishop granted a commission to inquire, and to compel reparation, if the facts should be proved (*e*).

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(*a*) Appendix, No. XV.

(*b*) Ib. No. XVI.

(*c*) Ib. No. XVII.

(*d*) Appendix, No. XVIII.

(*e*) Ib. No. XIX.

*Precedents to be referred to.*

The following, is where a rector having left dilapidations, which rested upon his executors or administrators; all his goods were put under sequestration by the archbishop in satisfaction of such dilapidations (*a*).

Another is, where the chancel and houses of a rectory being greatly dilapidated, by the neglect of the rector then living, a sequestration of the profits was issued by the archbishop, and, the cure being first provided for, reparation enjoined; with the usual denunciation of spiritual censures against all who should hinder or impede the same (*b*).

Again, a sequestration having been relaxed by the archbishop, upon caution being given to repair, inquiry is directed, whether any such repairs have been done, and if not, sequestration is to be made again (*c*).

The next precedent is upon the petition of a rector, to make sundry alterations in his parsonage-house, when the archbishop issues a commission to inspect the same and make a return (*d*).

After this inquisition and return had been made, concerning the proposed alterations to the said parsonage-house, by which its state and condition was reported, a licence was granted by the archbishop to demolish and rebuild, according to the tenor of the said return (*e*).

When a church is too ruinous to be repaired, or is placed in an inconvenient site, Bishop *Gibson* (*f*) gives a precedent which occurred in the reign of Queen Elizabeth, and a form of the letters patent (*g*) which recite that the old parish church of Woodham Waters in the county of Essex had become ruinous and dilapidated, and moreover was very inconveniently

Remedy  
where a  
church is too  
ruinous to be  
repaired.

(a) Appendix, No. XX.

(b) Ib. No. XXI.

(c) Ib. No. XXII.

(d) Ib. No. XXIII.

(e) Appendix, No. XXIV.

(f) Gibs. Cod. Jur. Eccl. App. § 4.  
No. X.

(g) Appendix, No. XXV.

situated for the inhabitants to attend divine service therein, her Majesty granted her royal licence to erect a new one in a more convenient place, and orders that the said new church, should in future be the parish church, and be used and frequented as such, notwithstanding the Statute of *Mortmain*.

All these examples, the originals of which are given at length in the Appendix, will serve as so many precedents, and guides, to the beneficed clergy, as well as to their architects and surveyors in such cases.

Some reported cases on ecclesiastical dilapidations and waste.

After the preceding general rules and laws, I shall proceed to give a selection of a few reported cases which bear upon ecclesiastical dilapidation, waste &c.

Countess of Rutland's case, a parson may open mines.

In Trinity Term, 15 Charles 2, it was moved in the King's Bench, for the court to grant a prohibition to a parson for digging new mines of coal in his glebe; and also for felling trees which grew thereon; for that it was *waste* and prohibitable by the statute (a) against prostrating trees &c. (b). But the court held, that it would not lay for the mines, for if so, no mines in any glebe could be now opened.

Case of Bishop Bancroft against Bishop Aymer.

An action was brought, says *Nelson* in his *Rights of the Clergy*, by Bishop *Bancroft*, against the son and heir of his predecessor Bishop *Aymer*; and obtained a sentence in the Court of Arches against him for 4,210*l.* as damages for suffering dilapidations in his palace and cathedral. And, because the son had not a *personal* estate from his father sufficient to satisfy the damages, the Lord Treasurer *Burleigh* was de-

(a) 35 Edw. 1. "We do prohibit the parsons of the church, that they do not presume to fell them" (the trees in the church-yard) "down unadvisedly, but when the chancel of the church wants necessary reparations. Neither shall they be converted into any other use, unless the body of the church do want repair; in which case the parsons of their charity shall do

well to relieve the parishioners with bestowing upon them the same trees, which we will not command to be done; but we will commend it when it is done."

(b) 5 Mod. 917. Roll. Rep. part ii. p. 813. Bulstr. vol. ii. p. 279. Ib. vol. iii. p. 158. Lev. Rep. part i. p. 107.

sired to bring a bill into parliament for the sale of as much of Bishop *Aylmer's* estate, as would discharge the same. This measure of Lord *Burleigh's* was both wise and equitable, especially when it is considered that the lands and *real* estate which descended to the son, were purchased with that very money which ought to have been expended in the repairs of the episcopal palace and cathedral. The heir, however, thought fit to compound with Bishop *Bancroft*, for a considerable sum of money, in order to prevent the making of a law to enforce him to pay the whole.

Dr. *Wood*, Bishop of Lichfield and Coventry in 1687, was suspended by Archbishop *Sancroft* for committing waste, and suffering dilapidations to his episcopal palace and other ecclesiastical buildings. The profits of his bishoprick were sequestered and the palace rebuilt therewith (a).

Dr. Wood's case.

That the practice of valuing or assessing damages for ecclesiastical dilapidations, and of suing the offender for them, is of very ancient usage in this country is proved by *Fuller* our venerable church historian, in his history of the worthies of England (b), who in narrating the life of *William of Edendon*, Bishop of Winchester and Lord High Chancellor of England in the reign of Edward 3, says, "that some condemn him for robbing *Peter*, to whom with *St. Swithin* the cathedral church of Winchester was dedicated, to pay *all saints* collectively, to whom his newly-erected convent at Edendon was consecrated, suffering his episcopal palace to decay and drop down whilst he raised up his new foundation." "This" says our worthy historian rather Hibernially, "he dearly paid for after his death," when his executors were sued for dilapidations by his successor *William of Wykeham*, the celebrated architect of Windsor Castle, "an excellent architect" says *Fuller*, "and therefore well knowing how to proportion his charges for reparation," who recovered of him the sum of £1622. 10s. (c)

Bishop Edendon sued for dilapidations by William of Wykeham.

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(a) Mod. Rep. part xii. fo. 237.

(b) Wiltshire.

(c) Bishop Godwin's History of the Bishops of Winchester.

as damages, a vast sum in those days. Besides this, his executors were forced to make good the standing stock of the bishoprick, which in his time was impaired to the number of 1556 oxen, 4717 wethers, 3521 ewes, 3521 lambs and 127 swine.

The Bishop  
of Durham's  
case.

Lord Coke informs us (a), that at a parliament held at Carlisle, in the 35th Edw. 1, was passed a notable resolution, to the effect, that great complaint was made to the King, that Sir Anthony, Bishop of Durham, had committed waste and destruction of the woods appertaining to his church in the bishoprick of Durham, by gift, sale and ill management; and for erecting forges of iron and lead, and burning charcoals to be used in the said iron and lead works to the disinheriting and impoverishment of the church, and in prejudice of the king and his crown and of the chapter of Durham. To which the reply was, that he be inhibited by the Court of Chancery from committing further waste upon the lands of his church.

By this it appears, says Lord Coke (b), that the parliament referred him to the ordinary remedy of the common law in this case, by a writ of prohibition in Chancery; or, says Sir Simon Degge (c), when a bishop or other clergyman commit waste upon the woods or lands of his church, a prohibition may be thus sued in Chancery, or in the King's Bench, to prohibit him; for *ecclesia est infra aetatem et in custodia domini regis, qui tenetur jura et hereditates ejusdem manu tenere et defendere*.

(a) Co. Rep. part II. fo. 49 a. "Et sur ceo un notable resolution in parliament tenuis al Carlisle in ann. 35 Edw. 1. fuit cite a cest effect, car la sur complaint fait (in ceux parolx) voille nostre seignior le roy entendre, que Sir Anthony Evesque de Duresme wast et destruit tout les boys appartenant a son Eglise in Levesquerie de Duresme, y done et vende et mauvais gard et pour rearer dez forges de ferre et plombe et ardre carbon &c.

dont al nostre seignior le roy que cest avowee del Eglise ny y mit remede, Leglise avant dit seyre disherite et impoverie, in prejudice de nostre seignior le roy in sa corone et de Chapter de Duresme. *Ita responsum est*; Inhibeatur per breve de cancellaria episcopo et ministris suis ne faciunt vastum de contentis in petitione."

(b) Ibid.

(c) Degge's Pars. Couns. part I. cap. viii.

So also, was the Archbishop of Dublin fined 800 marks, for disafforesting a forest belonging to his archbishoprick; and William (a) Abbot of Westminster, in the 15th year of King John, A. D. 1218, was deprived because he had wasted the revenues of his church or abbey. And it seems, says Sir Simon Degge (b), by several books of the common law (c), and by the canons of the church likewise (d), that in case a bishop, abbot, prior &c. waste the lands, woods or houses of his church, he may be deposed or deprived by his superior: so that it appears clearly, that the fault in this case lies heavy upon those who have the visitation and superiority, and do not take care against the wasting and destruction of the buildings, houses, woods &c. of the church; and that the successors should not be put to seek remedy against executors and administrators, who are too active in endeavours to avoid such repayments, which however they are compelled to by the before quoted statute of 18 Eliz. c. 2. But this act, says the same authority (e), gives no remedy at common law, because by another act passed in the same parliament (f) all such grants made to defraud any person or persons of their just actions are rendered void; so that the plaintiff, he continues, has equal remedy in both cases. Suits for ecclesiastical dilapidation, he says, are most properly and naturally to be sued in the Spiritual or Ecclesiastical Courts; of which courts, says Mr. J. H. Thomas, in his Luminous Systematic Arrangement of Lord Coke's First Institute (g), in the time of our Saxon ancestors, were not distinct from the civil; but the bishop of the diocese, and the alderman, or in his absence the sheriff of the county, used to set together in the County Court, and had there the cognizance of all causes, as well ecclesiastical as civil; a superior deference being paid to the bishop's opinion in spiritual matters, and to that of the lay judges in temporal. But the clergy claiming a separate jurisdiction, the

Other similar cases.

(a) Rottingham. 181 & 30.

(e) Sir Simon Degge.

(b) Degge's Parv. Cens. part i. cap. viii.

(f) 18 Eliz. c. 5.

(c) 20 Hen. 6. 46 a. Co. 3d Inst. p. 204. 2 Hen. 4. 3 b., &c. &c.

(g) Thomas's Systematic Arrangement of Lord Coke's 1st Institute, vol. iii. p. 333.

(d) Causa, 10. qu. 2.

two jurisdictions after the Conquest, were separated (a);— They were again united under Henry the First, but were soon after separated under Stephen. These courts are, 1. [The *Archdeacon's Court*, which is the lowest Ecclesiastical Court, being held in the archdeacon's absence before a judge appointed by himself, and called his official; and its jurisdiction is sometimes in concurrence with, sometimes in exclusion of the Bishop's Court of the diocese. From hence an appeal lies to the bishop, stat. 24 Hen. 8. c. 12. 2. The *Consistory Court of the bishop*, which is held in his cathedral for the trial of all ecclesiastical causes, arising within his diocese; and of which the bishop's chancellor, or his commissary, is the judge; whence an appeal lies to the archbishop, Ibid. 3. The *Court of Arches*, or Archbishop of Canterbury's Court of Appeal; whereof the judge is called the *dean of the arches*; because he anciently held his court in the church of St. Mary-le-bow, (Sancta Maria de Arcubus) though all the principal Spiritual Courts are now holden at Doctors' Commons. His jurisdiction, as dean of the arches and as the archbishop's principal official, the two offices being united together, extends to receiving and determining appeals from the sentences of all inferior Ecclesiastical Courts within the province. And from him lies an appeal to the king in Chancery, (that is, to a Court of Delegates appointed under the king's great seal) by stat. 25 Hen. 8. c. 19, as supreme head of the English church, in the place of the Bishop of Rome, who formerly exercised this jurisdiction (b). 4. The *Court of Peculiars*, which is a branch of the Court of Arches, having a jurisdiction over all those parishes, dispersed throughout the province of Canterbury, in the midst of other dioceses, which are exempt from the ordinary's jurisdiction, and are subject to the metropolitan only. From hence an appeal lies to the king in Chancery. 5. The *Prerogative Court*, which before a judge appointed by the archbishop is established for the trial of all testamentary causes, where the deceased has left *bona notabilia* within two different dioceses; in which case the probate of wills belongs to the archbishop of the pro-

(a) Hale's Hist. C. L. 102. Selden 1, in Eadm. page 6. l. 24. 4 Inst. 259. 3 Bla. Com. 61, 62.

(b) 3 Bla. Com. 63.

vince, by way of special prerogative. From hence an appeal lies by statute 25 Hen. 8. c. 19, to the king in Chancery. 6. The Court of Delegates, which is appointed by the king's commissioner under his great seal, and issuing out of Chancery, statute 25 Hen. 8. c. 19; and is the great Court of Appeal in all ecclesiastical causes. This commission is frequently filled with lords, spiritual and temporal, and always with judges of the courts at Westminster, and doctors of the civil law. But when the king is a party, the appeal does not then lie to him in Chancery; but by 24 Hen. 8. c. 12, the appeal shall lie to the bishops &c. of the upper house of the convocation of the province, in which the cause of the suit arises. Therefore in the province of York, the appeal now lies to the archbishop and his three bishops. In the province of Canterbury, to the rest of the bench of bishops (a). When the delegates are equally divided in opinion, so that no judgment can be pronounced, a commission of adjuncts may issue (b). 7. A Commission of Review, which is sometimes granted, in extraordinary cases, to revise the sentence of the Court of Delegates; when it is apprehended they have been led into a material error (c). These are the principal courts of ecclesiastical jurisdiction; none of which are allowed to be Courts of Record (d).

Among the duties of churchwardens (e), Sir Simon Degge (f) says, that among other things, it is their office to take care of the repair of the church; and in the articles promulgated in 1636, and to be inquired into by the churchwardens and sidesmen of every parish within the archdeaconry of Canterbury,

Powers and duties of churchwardens as to dilapidations.

(a) 1 Bla. Com. 290, n. 24, Christ.

and

(b) See 4 Barr. 2254.

(c) 4 Inst. 324. 3 Bla. Com. 67.

(d) Ibid.

(e) Blackstone in his Commentaries, (vol. II. p. 394,) says, that churchwardens are the guardians or keepers of the church, and representatives of

the body of the parish. Their duties, says Lord Stowell \*, were originally confined to the case of the ecclesiastical property of the parish over which they exercise discretionary power for specific purposes.

(f) Degge's Para. Couns. part i. cap. xii.

\* Haggard's Reports in the Consistory Court of London.



of churches  
and chapels,

of parsonage-  
houses &c.

whereunto, by virtue of their oaths, they are to make answer severally; the first is, "whether your church or chapel, with the *chancel* thereof be sufficiently maintained in all manner of needful reparations, both within and without; the walls and covering thereof strong and close, the windows well glazed; the floors, paved plain and even &c." The 12th runs "whether is your parsonage or vicarage-house, with all edifices thereto belonging, kept in good reparation?"

Similar articles were also ordered to be answered on oath, at the visitation of the diocese of London, by *Edwyn*, Bishop of London in the 13th year of Queen Elizabeth; in the third visitation of *Richard*, Bishop of London in 1604; in the first metropolitan visitation of *Richard*, Archbishop of Canterbury, in and for the dioceses of Exeter, Norwich, Chichester, St. David's, Llandaff, Hereford, Worcester, Bath and Wells, and Coventry and Lichfield in 1608; in the ordinary visitation of *George*, Archbishop of Canterbury in 1618; in that of *John*, Bishop of Norwich in 1619, and many others subsequently thereto, all of which tend to the same salutary end.

In the *liber quorundam canonum disciplinae ecclesie Anglicanæ, Anno Domini 1571*, in the article on churchwardens, it is ordered that the *churchwardens* shall see that the churches be diligently and well repaired with lead, tile, lime and glass; and the canons of 1603, § 14, says to the same effect, "*Edificurabunt ut ecclesiæ, plumbo, tegula, materia, vitro, diligenter et probe reficiantur.*" Dr. *Ayliffe*, in his *Parergon*, observed on this article of the canon law, that it is the duty of all churchwardens to *prevent the dilapidation of the chancel and mansion-house* belonging to the rector or vicar; and we find also, that it is equally the duty of the rector or vicar to *prevent the dilapidation of the nave*, where by custom it belongs to the church-wardens or the parish to repair it.

If a man hang up bells in a steeple, says Sir *Simon Degge* (a), they become church-goods, and are, by the sta-

(a) *Dagge's Par. Comm.* part i. cap. xii.

tute 11 Hen. 4. c. 12. parcel of the freehold of the church; and he cannot therefore afterwards remove them, for if he does he may be sued by the churchwardens, to whom the custody and possession of the goods of the church belong, though the property of them is in the parishioners. So, if a man take the organ out of the church, the churchwardens may have an action of trespass against him, because the organ belongs to the parishioners, and not to the parson (a).

Impropiators, or lay or improper holders of church preferment; as distinguished by Sir William Spelman (b), from appropriators or ecclesiastical and appropriate holders of such property, are bound to the repairs of dilapidations to the houses of their livings; and by the statute of Henry 8. cap. 1. § 2. an impropiator may sue and be sued in the Court Ecclesiastical. The statute 57 Geo. 3. c. 99. which repeals those of the 21st Hen. 8. c. 18. §§ 26. 28. 30. 32. 34. & 35; the 22nd Hen. 8. c. 13; the 18th Eliz. c. 9. § 8; the 3d Charles 1. c. 4. § 2. enacts, in the 14th section, that incumbents, whether parson or layman, not repairing their houses of residence to the satisfaction of the bishop shall be liable to the penalties of non-residence, until the same shall have been put in good and sufficient repair to the satisfaction of the bishop of the diocese. And by section 63 of the same statute, it is enacted, that it shall be lawful for the bishop, upon the application of any rector, vicar or spiritual person holding any benefice, the whole profit or income of which shall have been allotted to the curate, to allow such rector, vicar or spiritual person to deduct and retain therefrom in any or each year so much money, not exceeding in any case one fourth part of such profits or income, or of the salary assigned to the curate, as shall have been actually laid out and expended during the year in the repair of the chancel, parsonage, vicarage or other house of residence and premises and appurtenances thereto belonging, in respect of which such rector, vicar or person as aforesaid, or his executors, administrators or assigns would be liable for

Impropiators bound to repair dilapidations.

The bishop to allow the rector &c. to deduct from curate's salary for repairs to a limited amount in certain cases.

(a) Rolle's Abr. vol. i. p. 393.

(b) Spelman on Tithes, cap. xxix. p. 137.

dilapidations to the successors; and it is also enacted that it shall be lawful for the bishop in like manner to allow any rector, vicar or person as aforesaid, having or holding any benefice, the profits or income of which shall not exceed 150*l.* *per annum*, to deduct and retain from the salary allotted to the curate in each or any year, so much money as shall have been actually laid out and expended in such repairs as aforesaid over and above the amount of the surplus remaining of such profits or income after payment of the salary allotted to the curate, so that the sum so deducted, after laying out such surplus, shall not in any year exceed one fourth part of the salary allotted to the curate.

Dilapidations of the chancel to be repaired by the incumbent.

The dilapidations of the chancel are to be repaired at the expense of the incumbent of the living, whose property it is generally held to be, whether the benefice be an appropriation or an impropriation; that is, whether it be enjoyed by a *spiritual* person or a *layman*, except in certain cases, mentioned elsewhere, in which the custom of some of the parishes of London prevail to the contrary. The chancel is held by some authorities to be the only freehold, that the parson has, Lord Coke (a) saying, that the *parson impersonatus*, *persona impersonatus* is he who, as the lawful incumbent, is in actual possession of a parish church, and with whom the church is full, whether it be presentive or impropriate; and further, that *parson persona*, in the language of the law, is the rector of a parish church, and is called *persona ecclesiæ*; because he assumeth and taketh upon him the parson of the church. But the whole church and glebe is more generally held to be his freehold, although custom has in some instances exonerated him from the repairs.

The parson is chargeable with the repairs of the chancel, not only because of the profits which he receives from burying therein, but also in respect of the canon (b) law, wherein *Othobonus* enjoins, that none through covetousness, may ne-

(a) 1st Inst. fo. 300 a.

(b) Othobon. de domibus ecclesiarum reficiendis.

neglect their houses, the bishop or archdeacon, shall admonish the incumbents to repair them; and in case of neglect, the bishop shall do it at the charge of the incumbent. The same also is decreed, concerning chancels, and prelates are to keep their own houses in repair. And it was the opinion of the Judges of the Common Pleas, that the Spiritual Court may grant sequestration upon an *impropriate parsonage* for not repairing the chancel of the church. But it is a question whether it can be done for not repairing a parsonage-house.

In assessing the dilapidations left by a deceased rector or vicar, the architect has often to discriminate between what belongs to the family of the deceased, and what to the freehold of the living. In such cases the following rules abbreviated from decided cases may be found useful.

How to assess what belongs to the freehold of the parsonage, and what not.

If a parson sows his glebe land, and dies before it be fit for reaping, and his successor is admitted, instituted and inducted before the corn is cut: it shall go to the executors or administrators of the deceased; but, they must pay tithes thereof to the successor (a).

Land sown to whom the crops belong.

Things that are affixed to the tenement, and are made parcel of the freehold, belong to the successor and not to the executors or administrators (b). Therefore, the glass annexed to the windows of the house, and offices, belong to the successor, and any dilapidations or defects thereunto belonging must be valued, because they are parcel of the house, and descend to the next incumbent. And although the predecessor himself shall have put them in or glazed them at his own expense, yet being parcel of the house, neither he nor his executors can take them away without danger of punishment for waste. Neither is there any material difference in law, whether the glass be annexed to the windows by nails or in any other manner; because having been once affixed to the freehold of the church it cannot be removed, but must be

Things affixed to the freehold

Glass,

(a) Rolle's Abr. vol. i. p. 555.

(b) Swinburne, p. 421.

considered as the property of the new incumbent for his life, and dilapidations thereon assessed accordingly (a).

Wainscot,

The same is to be observed with regard to wainscot, ~~for~~ being annexed to the house, by whomsoever it may have been, even by the late incumbent himself, it is parcel of the tenement. And whether it be affixed by nails great or small, by screws, or by irons or holdfasts driven through or into the wall, posts or partitions, it is parcel of the freehold however it be affixed, and if the executors remove it they shall be punishable, for having committed waste and dilapidations (b).

Or other material.

And not only glass and wainscot, but any other such like affair affixed to the freehold, or to the ground, with mortar and stone, as *tables dormant*, *leads*, *mangers* and such like; for these belong to the freehold, and are to be left for the use of the successor, and dilapidations are to be assessed thereon accordingly (c). So also *millstones*, *anvils*, *doors*, *keys*, *window shutters* &c. are considered in law as parcel of the freehold and appertaining thereunto, and therefore belongs to the successor (d). *Pictures* and *glasses*, though generally speaking are not part of the freehold, yet if they are put up in the ~~form~~ of wainscot, let into and instead of a panel, or affixed where otherwise wainscot would have been put, they must go to the successor; for the law holds that the house ought not to come to the successor maimed or disfigured (e).

Heir-looms.

If an incumbent enter upon a parsonage-house, in which are hangings, grates, iron backs to chimneys and such like, not put there by the last incumbent, but which have gone from successor to successor; the executor of the last incumbent shall not have them, but they shall continue in the nature of heir-looms: but if the last incumbent fixed them there only for his own convenience, it appears, that they are to be deemed as furniture or household goods and go to his executors (f).

(a) Swinb. p. 421.

(b) Ibid.

(c) Ibid.

(d) Wentw. p. 61.

(e) Vernon's Chan. Reports, 508.

Law of Test. 380, 381.

(f) Co. 1st Inst. 185. Burn's Eccl.

Law, vol. iv. p. 303.

Private chapels, even if annexed to the church, must be repaired by the owners, but otherwise, if they be public chapels (a). The inhabitants of a precinct where there is a chapel, though it is a parochial chapel, and though they repair it, must nevertheless of common right contribute to the repairs of the mother church (b). And Dr. Godolphin (c) in his *Reperitorium Canonicum*, says it is contrary to common right, that persons who have a chapel of ease in a village should be discharged from repairing the mother church; for it may be, he adds, that the church being built of stone, may not have needed any reparation within the memory of man; and yet that doth not discharge them without some special cause of discharge being shewed. This must be specially borne in mind by the architect when he is surveying parochial dilapidations.

But, says Sir Henry Rolle, in his *Abridgment of Cases and Resolutions of Law* (d), if the inhabitants of a chapelry prescribe to be discharged time out of mind of the reparation of the mother church, a prohibition will lie on such surmise. And in the time of William I (e) the inhabitants of a chapelry within a parish, were prosecuted in the Ecclesiastical Court, for not paying towards the repairs of the parish church; and the case was, that those of the chapelry never had contributed, though they had always buried at the mother church, till about the reign of Henry the Eighth, when the bishop was prevailed on to consecrate them a burial-place, in consideration of which they agreed to pay towards the repairs of the mother church.

These facts appeared upon the libel, and Lord Holt, Chief Justice, held, that the inhabitants of a chapelry may prescribe to be exempt from repairing the mother church, as where it buries and christens within itself, and hath never contributed to the mother church. For in that case, it shall be intended

(a) Co. 2d Inst. p. 489.

(d) Roll. Abr. vol. ii. p. 290.

(b) Gibb. Cod. fo. 197. Roll. Rep. vol. ii. p. 265. Hob. Rep. p. 66.

(e) Ball and Cross, Salk. Rep. vol. i. pp. 164 and 165.

(c) Godol. p. 155.

coeval, and not a latter erection in ease of the inhabitants of the chapelry; for they had buried at the mother church till Henry the Eighth's time, and then undertook to contribute to the repairs of the mother church. Now although, at the first sight, this may seem somewhat hard, yet it has this good foundation of reason; that all chapels, and discharges from attending divine service at the mother church, were originally matters of grace and favour; and the ease and convenience of particular inhabitants, ought not to be purchased with inconvenience and damage to the mother church; in whose right it was specially provided on those occasions, that nothing should be done in prejudice thereof (*a*). The repairs of a chapel are to be made by rates on the landholders within the chapelry, in the same manner as the repairs of a church; and such rates are to be enforced by ecclesiastical authority (*b*).

Two sorts of  
chancels,

the greater  
chancel,

In many parishes, the churches have two chancels, a *greater*, belonging to the parson, and a *lesser*, built at the end, belonging to the patron of the living or impropriator. In surveying the dilapidations of these appendages to churches, the architect must carefully discriminate to whom he assesses the repairs thereof. It is clear, says *Johnson* (*c*) in his *Eccelesiastical Laws*, that the use of the chancel was entirely in the vicar, whoever repairs it; and that the Reformation left the rights of the parson and vicar as it found them; and that therefore it is a very groundless notion with impropriators, that they have the same right in the great chancel that a nobleman has in a lesser. In the case of *Clifford v. Wicks* and *Townsend* (*d*), it was held, that a general grant of part of the chancel of a church by a lay impropriator to A. his heirs and assigns, is not valid in law; and therefore such grantee or those claiming under him, cannot maintain an action of trespass for pulling down his or their pews there erected. For if such a grant were good, said Mr. Justice *Holroyd*, in another case (*e*), it would take the chancel out of the jurisdiction of the ordi-

(a) *Gibbs. Cod. Jur. Eccl.* p. 207.

(b) *Ibid.*

(c) *Johns. Eccl. Law*, p. 244.

(d) *Bar. & Ald. Rep.* vol. i. p. 498.

(e) *Ib.* 507, 508; also see *Pettman v. Bridger*.

nary, so that it might be desecrated or filled with seats which might descend to strangers and exclude the parishioners. The chancel was unalienable by the rector without consent of the ordinary before the dissolution of the monasteries; and the general saving in the 31st Hen. 8. c. 18. § 4. leaves this right as it existed before.

These *lesser* chancels are supposed by lawyers, says *Johnson* (a), to have been built for the sole use of those noble persons, who erected them; whereas it is clear the great chancels were originally for the use of clergy and people, but especially for the celebration of the Eucharist, and other public offices of religion, there to be performed by the curate and his assistants. That the parsons repair these great chancels, does not at all prove their sole right to them; for they were bound originally to repair the church as well as the chancel; and of common right the repairs of the church are still in the parson, it is custom only that eases them of that burthen. If any seats annexed to the church be pulled down, says *Sir Simon Degge* (b), the property of the materials is in the parson, and he may make use of them if they were placed in the church by any one of his own head, without any legal authority; but for the seats erected by the parishioners upon good authority, it appears, from the same authority, that the property of the materials upon removal is in the parishioners.

and the lesser chancels.

Seats pulled down.

In surveying the dilapidations of prebendal houses, it may be well for the ecclesiastical surveyor to remember, that a prebendary leaving a house, by death or cession, out of repair, he or his executors, as the case may be, are liable to a suit of dilapidation, though it was not annexed to the prebendal stall. This was declared in the Court of King's Bench in the 35th Charles 2. in the case of *Dr. Sands*, a residentiary prebendary of the cathedral church of Wells, who brought an action for dilapidations in the Spiritual Court against the executors of *Dr. Pierce*, his predecessor. The Counsel on

Prebendal dilapidations.

(a) *Johns. Eccl. Law*, pp. 244, 5. (b) *Degge's Pars. Coun.* part i. ch. 12.



the other side shewed, that in that church there are eight residentiary prebendaries, to which, for the purpose of encouraging them to residence, there are eight houses belonging. That to each prebend, there is a house belonging, but not in any house in certain, the bishop having the privilege of appointing what house he thinks fit to each prebendary; but he must appoint one. Hence they inferred that this house went not in succession, nor is it part of the corps of a prebend, for that he was a prebendary, and had one house assigned to him, (and so was Dr. *Sands*;) and afterwards upon the death of another prebendary, another house. But Mr. Justice *Jones* answered, it is true here are eight houses belonging to eight residentiary prebendaries, whereof each prebendary *de jure* is to have one; that no one house is assigned to any particular prebend, or is parcel of any particular prebend, but ought to be assigned to some particular prebend, and when the bishop doth so assign by virtue of his power, and not by virtue of any estate he had in him; then it is part of the prebend, and shall be liable to a suit of dilapidation; therefore there ought to be no prohibition (*a*).

An action on the case, for dilapidations, of prebendal houses, lies at common law.

In a late case (*b*) from the Church of Ely, it was decided that an action on the case for dilapidations of a prebendal house, may be maintained at common law by a succeeding prebendary against his predecessor who had resigned. But as it appeared by the Statutes of the Church of Ely, that the receiver of the Chapter ought to require the prebendaries to repair their houses, providing them with the necessary materials from the funds of the church, and as he had neglected to do this, the plaintiff recovered from his predecessor only the expense of workmanship, the Court being of opinion that the materials ought to have been furnished him by the church.

It is now settled, by the above case, that an action on the case for dilapidations lies at common law; and it makes no

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(a) *Skin. Rep.* p. 121, pl. 18.

(b) *Radclyffe v. Doyly*, *Term Rep.* vol. ii. p. 650.

difference, says Dr. Burn (a), whether it be brought against the executor of the incumbent, or the incumbent himself, who has accepted other preferment.

By the case of *Browne v. Ramsden*, where a vicar sued for dilapidations, and averred that he was seised in right of the vicarage of C. and it appeared that the premises in question were copyhold, and devised in 1632, to the Master and Senior Fellows of Trinity College, Cambridge, in trust, to permit the vicar of C. to take the rents and profits, after deducting charges for duties to the lord of the manor, and for necessary repairs. It was held, that if the estate had been in fee the legal seisin would have been vested in the trustees, and not in plaintiff as vicar: but as being copyhold, they were not within the statute of the 9 Geo. 2. c. 36. and therefore the use was not executed according to the statute. Vicarial dilapidations.

Where successive rectors had been in possession of land for above fifty years, and in an action for dilapidations, brought by the (then) present rector against his immediate predecessor, it appeared in the case of *Wright v. Smythies* (b), that the absolute seisin in fee of the same land was in certain devisees since the statute of the 9 Geo. 2. c. 36. and that no conveyance was enrolled according to § 1. which enacts enrolment in the Court of Chancery within six months after execution of the deed; nor any disposition of it made to any college &c. according to § 4; it was held that no presumption could be made of any such conveyance enrolled, which, if it existed, the party might have shewn, and consequently that the rector had no title to the land: as the statute avoids all other grants &c. in trust for any charitable use made otherwise than is thereby directed; though in fact it appeared that one of those devisees was the then rector, and that the title to the rectory was in *Baliol College, Oxford*. Where successive rectors have left dilapidations.

In an action for dilapidations by a vicar against his predecessor, in the case of *Browne, clerk, v. Ramsden* (c), the plain- Copyhold vicarial dilapidations.

(a) Burn. Ec. Law, vol. ii. p. 152, n. h. (b) East. Rep. vol. x. p. 409.

(c) Taunt. Rep. vol. viii. p. 559.

tiff stated in his declaration that the defendant was seised of the premises in question in right of his vicarage. The premises were copyhold, and were devised to the Master and Senior Fellows of Trinity College, Cambridge, in trust, to permit the vicar for the time being to receive the rents and profits (the charges to the lord, and *expenses of reparations being first deducted*); held, that as there was no seisin in the vicar, the plaintiff could not maintain his action.

Repairs of dilapidations by sequestration.

A sequestrator of a benefice, says Dr. Burn (a), (though a creditor) is a kind of bailiff to the bishop in whose diocese the dilapidations have occurred, and to whom the writ of *levari facias* is mandatory, and who is, in a general sense, to be considered as an ecclesiastical sheriff, and his office is only ministerial, as was held in the case of *Walwyn v. Aubery* (b); and he will be liable to dilapidations, as inseparable from the benefice, and not to be disjoined from the duties of the sequestration, even by the authority of the bishop, as was held in the case of *Hubbard v. Beckford* (c). [As to the immediate execution of the writ, see the same report, page 311, note \*;] and that the Court have the same power over the bishop in such a case, as over a sheriff; see the case of *The King v. The Bishop of London* (d). Thus, says the Doctor, he may be sued for dilapidations in the Bishop's Court, unless the sequestration has been determined and the accounts made up, as decided in the cases of *Whinfield v. Watkins* (e), and *Hubbard v. Beckford* (f). Sometimes when the houses and chancels that the incumbent is bound to repair, are ruined and ready to fall, if after due admonition they shall delay to begin to amend the same within two months, then the bishop of the diocese, that time being elapsed, shall sequester the fruits and tithes till those defects are amended; and, says Dr. Godolphin (g), though the admonition proceed from the archdeacon, yet the bishop only has the power of sequestration.

(a) Burn's Eccl. Law, vol. ii. p. 157.

(e) Phill. Rep. vol. ii. p. 5.

(b) Mod. Rep. vol. i. p. 260.

(f) Ibid. note.

(c) Haggard's Rep. vol. i. p. 307.

(g) Repertorium Canonicum, Ap-

(d) Dowl. & Ry. Rep. vol. i. p. 486. pendix, 14.

If an appeal be made against a sentence of sequestration, and lawfully prosecuted, the party sequestered, says Archbishop *Stratford* (a), is to enjoy the profits, pending the appeal. It is usual, says *Watson*, in his *Clergyman's Law* (b), for the ecclesiastical Judge, to take bond of the sequestrators, well and truly to gather and receive the tithes, fruits and other profits, and to render a just account. And those to whom the sequestration is committed, are to cause the same to be published in the respective churches, in the time of divine service.

If, after the dilapidations are repaired, the sequestrators refuse to deliver up their charge, they can be compelled, says the same Author (c), so to do, by the ecclesiastical Judge; and if they being called so to do, shall delay to give an account, it is usual for the Judge to deliver to the party aggrieved, the bond given with a warrant of attorney to sue for the penalty thereof to his own use, at the common law.

In surveying dilapidations, the architect should be furnished with the schedule or specification of the fittings, finishings, fixtures &c. of the ecclesiastical residences, that he is employed to survey.

Schedules or specifications of the buildings should be delivered to the surveyor.

By the authority of the 87th canon, the archbishops, and all bishops within their several dioceses, shall procure, (as much as in them lieth) that a true note and terrier of all the glebes, lands, meadows, gardens, orchards, houses, stocks, implements, tenements and portions of tithes lying out of their parishes, which belong to any parsonage, vicarage, or rural prebend, be taken by the view of honest men in every parish, by the appointment of the bishop, whereof the minister is to be one. And it is to be laid up in the bishop's registry, as a perpetual memorial. Dr. *Godolphin* (d) says, that a copy of such terrier or schedule properly exemplified, should be kept also in the church chest.

Such specifications, surveys or terriers must be made.

(a) Lyndewode, 104.

(c) Wats. Clergyman's Law, c. 30.

(b) Wats. Clergyman's Law, c. 30.

(d) Rep. Can. App. 12.

These terriers, says *Johnson* (a), are of greater authority in the Ecclesiastical Courts, than they are in the Temporal; for the Ecclesiastical Courts are not allowed to be Courts of Record; and yet even in the Temporal Courts, they are of some weight when duly attested by the register; especially if they be signed, not only by the parson and churchwardens, but also by some of the substantial inhabitants; for if they be signed by the parson only, they can be no evidence for him. So neither (as it seemeth), says the Anonymous Author of the *Theory of Evidence* (b), which is quoted as of authority by Mr. *Tyrwhitt*, in his last edition of Dr. *Burn's Ecclesiastical Law*, if they be signed only by the parson and churchwardens, if the churchwardens are of his nomination. But in all cases they are certainly strong evidence against the parson who has left dilapidations.

Ecclesiastical surveys or terriers of the temporalities of the clergyman in every parish, made by virtue of the before-mentioned canon, are to be kept in the bishop's register-office, as ruled by Mr. Justice *Macdonald*, in the Common Pleas, in the case of *Miller v. Foster* (c).

Form of an  
ecclesiastical  
survey or  
terrier.

The following extracts from a form of a terrier, given by Dr. *Burn* (d), will show the ecclesiastical surveyor the nature of such documents, and their utility to him when surveying the dilapidations of a benefice, or in taking them when repaired or rebuilt.

A true note and terrier of all the glebes, lands, meadows, orchards, houses, stocks, implements, tenements, portions of tithes and other rights, belonging to the vicarage and parish church of Orton, otherwise Overton, in the county of Westmorland, and diocese of Carlisle, now in the use and possession of *Richard Burn*, clerk, vicar of the said church; taken, made and renewed according to the old evidences and know-

(a) Ecclesiastical Law, p. 248.

(b) Theory of Evidence, p. 45.

(c) Sir H. Gwillim's Reports of  
Tithe Cases, p. 1406.

(d) Vol. iii. p. 400.

ledge of the ancient inhabitants, this 10th day of November, in the year of our Lord 1749, by the appointment of the Right Reverend Father in God, *Richard*, Lord Bishop of *Carlisle*, at his primary visitation, held at Appleby, in the said county, and diocese aforesaid, the 8th day of June, in the same year; and exhibited before the Reverend and Worahipful *John Wagh*, Doctor of Laws, Chancellor of the aforesaid diocese, on the 20th day of November, in the year aforesaid.

*Imprimis*.—One slated dwelling-house, in length fifty-one feet, in breadth nineteen feet within the walls. One thatched barn, stable, cow-house and peat-house, contiguous to each other, under the same roof, in length eighty-one feet, in breadth twenty-one feet, without the walls. One other little stable, in length thirteen feet, in breadth twelve feet and a half, adjoining to the peat-house at the south-west side and end. *Item*, the church-yard, containing three roods and nineteen perches, adjoining to the grounds of *Robert Teasdale* on the south; of *Richard Alderson* on the west and north, and to a close belonging to the said vicarage, called Prior Garth, on the east: *the walls and gates thereof round about, made by the parish*. *Item*, one inclosure called Prior Garth, containing three roods and seven perches, adjoining to the church-lane on the south; to the church-yard on the west; to the ground of *Richard Alderson*, on the north; and to the highway on the east, through which there lies a foot-path from the vicarage-house to the church, but for no other purpose: *the wall and hedge on the south, north and east, made by the vicar; and on the west, where it adjoins to the church-yard, by the parish*. *Item*, one garden, containing one rood eleven perches, adjoining to the vicarage garth, and to the ends of the barn and of the dwelling-house, on the south; to the highway on the west and north; and to the said garth on the east: *the fence round about made by the vicar*. *Item*, one parroch, containing twenty-four perches and a half, adjoining to Orton Green on the south; to the highway on the west; to the end of the dwelling-house on the north; and to the vicarage garth on the east: *the fence round about made by the vicar*. *Item*, one garth, containing one acre fifteen perches and a half, ad-

Description of the dwelling-house &c.

by whom made,

and by whom to be repaired.

joining to the grounds of *John Powley, Daniel Teasdale,* and Orton Green on the south; to the said parrock, barn and garden on the west; to the peat-house end, garden and highway on the north; and to a close belonging to the said vicarage called Corn Close, on the east: *the fence round about made by the vicar, except that John Powley makes the fence where it adjoins to his ground, and Daniel Teasdale from thence to the bottom of the old lime-kiln; through which garth lies a foot-path for the said John Powley and Daniel Teasdale to and from the said grounds, and likewise a driving-way for their sheep, which they frequented whilst the common field was uninclosed, but is now become almost useless. Item, one inclosure, called Corn Close, containing one acre, one rood and twenty-one perches, adjoining to the said John Powley's lane, and to a piece of ground before his barn called a Flee Room, and to his garth on the south; to the vicar's said garth on the west; to the highway on the north; and to the highway and John Powley's lane on the east: the fence all about made by the vicar, except where it adjoins to John Powley's garth and barn. All which said corn close, garth, garden and parrock, have been inclosed ground from time immemorial, and the vicar in respect thereof hath not repaired any part of the highway adjoining thereunto. Opposite to the same, on the north side, is an inclosure made by Daniel Teasdale about nine years ago, by which the highway was made into a lane. Item, one inclosure called Fore Dale, containing three acres and fifteen perches, adjoining to the grounds of Robert Teasdale and John Nelson on the south; of John Nelson on the west; of John Powley and Robert Teasdale on the north, and of Robert Teasdale on the east: all the fence made by the vicar, except where it adjoins to the said John Nelson's in-croft, and except half the length of the said John Nelson's out-croft, from the middle to the east end, the said John Nelson's fence being a stone wall: from the east end of which inclosure lies a way through Robert Teasdale's ground, which the present incumbent purchased of the said Robert Teasdale, to an inclosure belonging to the said vicar (but not to the vicarage), called Long Roods, which is to continue for ever, and may be of use, if at any time hereafter the said two inclosures (Fore Dals.*

and Long Roads), shall be occupied by the same person or otherwise. *Item*, one other inclosure called the Greater Mill-brow, containing one acre, three roods, and seven perches, adjoining to the ground of *John Powley* on the south; to a tillage-way enjoyed and repaired by the said vicar, on the west; to the ground of *Thomas Ireland* on the north; and of *John Powley* on the east: all the fence made by the vicar, except about sixteen yards of stone-wall at the north-east end, belonging to *John Powley*. *Item*, one other inclosure, called Little Mill-brow, containing twenty-eight perches, adjoining to the ground of *John Powley* on the south; of *Isabella Atkinson* on the west; of *Isabella Atkinson* and *Thomas Ireland* on the north; and the said tillage-way on the east: the fence all made by the vicar: through the south-west corner of which inclosure is the ancient water-course; the said three last inclosures were made out of the common field, by the present incumbent. *Item*, one other inclosure called Glebe Close, lying at *Firhiggins*, containing eight acres and three roods, adjoining to the ground of *Elizabeth Turner* on the south; of *Elizabeth Turner* and *William Thwaytes* on the west; of *William Thwaytes* on the north; and to the common on the east: the wall at the east end is made by the vicar; at the west end by *Elizabeth Turner* and *William Thwaytes*: N. B. The right of repairing the fence on the north side, and on the south side, is in dispute, and not yet determined. At the end of *Elizabeth Turner's* house, an oak gate is to be maintained by the owners of Coal Garth; for which they are to enjoy a liberty of ingress and egress for themselves and families, and liberty of driving cattle in the winter, from Martinmas to Lady-day, doing as little damage as may be; and of passing with peats or other firing in the summer. Belonging to the said Glebe Close, and occupied therewith, there is likewise a parcel of ground leading from the said gate at *Elizabeth Turner's* house end, north-eastward, to the said Glebe Close, having the wall on the left hand, and meted out from *Elizabeth Turner's* ground on the right, in breadth three yards or upwards, being the way to and through the said Glebe Close. *Item*, another parcel of ground, in the common field, called North Lands, containing two roods and five perches, adjoining to the ground



of *Robert Teasdale* on the south; of *John Nelson* on the west and north; and of *Robert Teasdale* on the east. *Item*, another parcel of ground, in the common field, called Pots-land Head, containing one rood, adjoining to the ground of *Robert Teasdale* on the south; of *Elizabeth Waller* on the west, down by the runner; of *John Nelson* on the north; and of *Robert Teasdale* on the east.

All which said lands, containing in the whole nineteen acres and upwards, are situate within the lordship and manor of Orton, free from the payment of any fines, rents or services to any chief lord; the royalties of which said lands are also in the vicar. *Item*, a parcel of peat-moss in Orton-low-Moor, containing, by estimation, ten acres, known by the name of "The Vicar's Moss."

Terrier of the  
tithes, and  
manner of  
paying them.

Then the terrier proceeds to enumerate the nature of the tithes throughout the parish, and to describe the manner of tithing, which, as it has no relation to the subject of this Work, is omitted. Next come the oblations, the surplice and other fees; the dues to the parish clerk, sexton &c. which are likewise omitted for the same reason. The reader will perceive in the preceding portion, the necessity of describing particularly the buildings, walls, fences &c. as well as who they are to be repaired by, as a guide to the architect or surveyor, how and to whom, to assess the dilapidations of the benefice.

Specifications  
of the build-  
ings &c. be-  
longing to the  
parish.

Next, is described, what ecclesiastical property belongs to the parish, as follows:

Belonging to the said parish are, first, the parish church, an ancient building, containing in length, *with the chancel*, ninety-six feet, in breadth forty-eight feet. The chancel, in breadth, one part thirty feet, the other part twenty-one feet. The tower fifteen feet square within the walls, and sixty feet in height. It then proceeds to enumerate the communion table, furniture, linen, communion plate &c.; the pulpit, reading-desk, cushions &c.; the bibles and other books belonging to the parish, the king's arms, with the ten commandments; one

church clock. Four bells, with their frames; the first, or least bell, being two feet seven inches and a half in diameter, with this inscription, "*Jesus be our Speed, 1637*;" the second, two feet and eleven inches in diameter, with an ancient inscription, "*Omnium animarum*," perhaps by a mistake of the bell-founder, for "*Omnium sanctorum*," to whom the church is dedicated; the third, three feet and two inches in diameter, with this inscription, "*Soli deo gloria, 1637*;" the fourth, or largest, three feet six inches and a half in diameter, with this inscription, "*Mr. Thomas Nelson, Vicar; John Bowness; John Winter, 1711.*"

It then describes the biers, herse cloths, surplices, parchment register books, with the dates of their beginnings, endings &c. which are unnecessary for our immediate purpose to enumerate at length, and goes on to the seats in the church and chancel, which, it observes, have been repaired from time immemorial (except the vicar's pew) at the public expense of the parish. This determines which party is to be at the charge of repairing the several dilapidations of this portion of the benefice. The specification then observes, that there were also several new common or free seats, erected by the church-wardens that year, at the lower end of the church, adjoining to the belfry. It also describes, that there is also *belonging to the said parish, the rectory thereof (which determines in whom the impropriation, and consequently the repairs of the rectorial dilapidations lie)*, together with the tithes of corn, hay, calves, milk and other dues, which did formerly belong to the priory of *Conieshead* (a), in Lancashire, and after the dissolution of

What portion of the church repaired by the parish and what by the vicar.

(a) In the second volume of Dugdale's *Monasticon*, page 424, there is a copy of a charter of King Edward the 3d, confirming, amongst other things, a grant which had been made to God and St. Mary, and the house of Conyngeshead\*, and the confreres there, by Gamellus de Penigton, of the churches of Penigton and Molcastre,

with their chapels and appurtenances, and of the church of Wytebec, and of the church of *Skereverton*, so denominated from the Icelandic *skier*, a scar or rock (which word is still in use in the county of Lancaster), the town of Orton being under the mountain which still bears the name of Orton or Overton Scar.

\* *Conyngeshead* is the same, says the Editor of Burn, as the king's head, from the Saxon *cuning* or *conyng*, which signifies king, and *heafod*, head.

the monasteries, *were purchased by the inhabitants.* Also, the advowson of the vicarage, which belonged also to the said priory, and was likewise purchased with the rectory. This is also important to be known, as the means of apportioning the vicarial and parochial dilapidations.

It also describes particularly, a box with three locks, in the keeping of *John Unthank*, of Orton, in which are deposited the purchase-deeds of the rectory and advowson; a copy of the endowment of the vicarage in 1263; the purchase-deeds of the manors of Orton and Raisbeck, by the inhabitants; bounder-rolls and other public documents and writings. It also enumerates the various other property belonging to the parish, money in the hands of individuals, with the nature of the securities, stock, legacies &c. and the purposes to which they are to be appropriated. Also, that twelve men, in addition to the church-wardens and overseers of the poor, are to be chosen yearly in Easter week, at a vestry meeting, by a majority of votes, to be sidesmen and a select vestry for the year ensuing.

The specification to enumerate public schools.

The specification next goes on to particularize, that there are three schools in the said parish; one at Orton, then lately built by the inhabitants, and endowed by *Agnes Holme*, of Orton, widow, with a parcel of land lying in Orton Field, containing, by estimation, one acre, of the present yearly rent of ten shillings, adjoining to the grounds of *Christopher Parker* on the south, west and east, and to a land belonging to the vicarage of Burgh on the north, endowed also by *Robert Wilson*, of Long Sleddale, yeoman, with the sum of five pounds, now in the hands of *Thomas Green*, of Langdale. Another school at Tebay, founded by *Robert Adamson*, of Blacketbottom, in Grayrigg, gentleman, in the year 1672, and endowed by him with the estates called Ormondie Biggin and Blacketbottom, in Grayrigg, now of the yearly rent of sixteen pounds. Another school at Greenholme, founded by *George Gibson*, of Greenholme, gentleman, in the year 1733, and endowed by him with four hundred pounds original bank stock, of the yearly produce of about twenty-two pounds.

In testimony of the truth of the before-mentioned particulars, and of every of them, we, the minister, church-wardens and principal inhabitants, have set our hands, the 10th day of November, in the year of our Lord 1749.

R. BURN, *Vicar.*

Then follows the names of the church-wardens, overseers of the poor, and of the twelve annual sidesmen, who formed the select vestry for the year.

Thus, we may gather from the preceding original document, (which is given as an example by Dr. *Burn*, and is so complete in all its parts, that I have uniformly taken it as a guide in making such a specification or terrier of a benefice), that in preparing such an instrument, the ecclesiastical surveyor or architect ought to begin by a description of what his specification or terrier consists of; then to describe, topographically and ecclesiastically, the situation and localities, the evidences and proofs on which it is founded, and the authority of the bishop or ordinary before whom it was exhibited and approved.

Instructions for drawing a specification or terrier of an ecclesiastical survey.

Then a description of the buildings belonging to the benefice, their dimensions, mode of construction, materials with which they are built, and such like. The inclosures, gardens, fields, closes &c. with a description of the fences, walls &c. with which they are inclosed, by whom constructed, and by whom they are to be repaired. Next the tithes, and manner of collecting and paying them; the surplice and other fees; the valuation of the glebe, tithes and profits, taken on an average *communibus annis*; the dues to the parish clerk, sexton &c.

Description of the buildings that appertain to the benefice.

Next, a specification of what buildings on the benefice that belong to the parish, such as the parish church, its dimensions and mode of construction, and by whom repaired. The furniture, books, communion plate, bells, surplices &c. The seats, pewing, and such like, and by whom repaired; the chancel described in the same manner. Also what monies, legacies, interest, rents &c. that belong to the parish; the schools, en-

The same that belong to the parish.

dowments &c.; and finally, the testimonial to the truth of the above, by the rector or vicar, the church-wardens, overseers of the poor, sidemen, and some of the most ancient inhabitants of the parish, with the surveyor or surveyors who made the specification and tetter.

Examples of  
remedied  
cases.

Various de-  
scriptions of  
ecclesiastical  
tenures.

An architect employed to survey the dilapidations, that have been committed or suffered to accrue in and upon the houses, fences &c. of any ecclesiastical benefice, should make himself acquainted with the nature of the benefice that he is employed to survey; whether it be episcopal, archidiaconal, decanal, dean and chapter, collegiate, rectorial, vicarial, or otherwise, and should be furnished with a copy or original of the lease, or tenure under which it is held. One example of a clerical holding of rather a complicated nature, may suffice as an outline for the student, taken from the measuring book as it actually occurred.

Description of  
a survey.

The information I received was, that the benefice in question was to be surveyed on the part of the new incumbent, against the executors of the deceased rector, who had, or was conceived to have left dilapidations in a new parsonage-house, built by himself. These dilapidations I took as repairs in amount, on the general principle, that the original incumbent, having had either a new parsonage-house and offices, built for him by the original patron, or a house and offices in complete repair, *he and his successors for ever* are bound to keep and leave them so, or to pay to his successors a sum equivalent thereto; for it is not to be expected, when a clergyman is appointed to a living, that he is to expend money, either in erecting or repairing the buildings of his benefice. The custom moreover being so general and so well understood, prevents it from operating as a hardship on the widows or heirs of such ecclesiastical persons.

Conditions of  
the tenure.

The information that I collected for this case went on to the effect, that the parsonage-house or priory, was held by lease from the President and Scholars of the College of St. Mary Magdalene, Oxford; I conceived therefore that the dilapidations

were not to be estimated, as if the house were strictly a clerical one, but according to the terms of that lease; from which I extracted as follows; namely:—"And the said *Thomas Hutchinson* for himself, his executors and administrators, doth covenant and agree, to and with the said President and Scholars, and their successors by these presents, that he the said *Thomas Hutchinson*, his executors and administrators, shall at his and their own proper costs and charges, as often as need shall require during the said term, well and sufficiently repair, maintain, uphold and keep all manner of houses, barns and edifices belonging to the said priories, hereinbefore demised in all kind of preparations, stuff and workmanship (except great rough timber) which the said President and Scholars and their successors, shall find and allow, if any be growing in and upon the premises; but the carriage and workmanship thereof to be at the costs and charges of the said *Thomas Hutchinson*, his executors and administrators during the said term:—and so in the end thereof, the said priory and other the premises being well and sufficiently repaired and made, shall leave and yield up; and also make, maintain and keep, all the mounds, hedges and ditches, taking sufficient fryth for the making thereof, out of the said demised premises, if any be growing in and upon the same."

All the buildings of the benefice to be kept in repair.

From this lease, therefore, it appeared that the buildings of all descriptions, were to be maintained in all kind of repairs, during the term, and so to be rendered up at the end of it.

The chancel also, was also to be examined as to the state of its repair, and an estimate to be made accordingly. There was also a vicarage-house on the benefice, the dilapidations of which were to be valued in the ordinary way, as vicarial dilapidations. It was a mere cottage, and was of course considered and treated as such.

Chancel and vicarage-house.

My attention was particularly called at the priory or parsonage-house, to the state of the walls and the strength of the girders, tie beams and main timbers of the house, (which had

been recently erected by country workmen) particularly to the principal rafters and purlines which supported the attic-story; which originally was not intended to have been erected, and in order to give additional height, it appeared that the principals did not rest upon the wall plate as they ought to have done, but had been inserted, in an insufficient manner, into it. One of the questions therefore was, had the builder (for architect there had been none) used his materials with proper skill, and made the roof equally safe. Some of the timbers were also warped, and the cieling of one of the best chambers was cracked in various places, either from the greenness of the timber, or the bad formation of the cieling floor, and wanted a complete renovation. Being so recently new, it was therefore a difficult question as to the liability of the late incumbent's executors to renew, or repair this deficiency of original construction. The principal girders of one of the ground-stories, was also supported by a fir post, instead of (as it might appear from its situation in a damp basement it ought to have been, by) a brick or stone pier.

The gates,  
fences and  
boundary  
walls.

The state of the gates, fences and boundary walls, also required examination, as they had, notwithstanding the recent rebuilding of the parsonage-house, been greatly neglected, although timber had been granted by the President, at his last visit to the priory, for a new fence in the front of the house; therefore the labour of converting growing timber to such a purpose, of course, belonged to the representatives of the late Dr. *Hutchinson*, the last incumbent, and was included in the estimate.

Parsonage-  
house, barn,  
stables &c.

The parsonage house, barn, stables, store-house over the wharf by the side of the River Adur, and the chancel of the church, were surveyed on the account of the President and Scholars of the College, and the vicarage-house and garden, on the account of the new rector; and the report and estimate are given for the use of students in the Appendix (a).

## Timber may be cut for Ecclesiastical Repairs.

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As the subject of ecclesiastical leases is now before us, it may be as well to mention, for the guidance of the ecclesiastical surveyor, that covenants in bishops' leases, bind not the successor, unless such covenants had usually been inserted in former leases, as was decided by the Court of King's Bench in the case of *Davenant v. The Bishop of Salisbury* (a).

Covenants in bishops' leases bind not the successor, unless in former leases used.

In the preceding case of *Dr. Hutchinson and the President and Fellows of Magdalene College, Oxford*, an exception is made against cutting great rough timber. But, where no such exception is made in the lease, a rector may cut down timber for the repairs of the parsonage-house, or of the chancel of the church, but not for any common purpose, as was decided by Lord Chancellor *Hardwicke* (b), in the case of *Strachy v. Hume*, which was argued before him November 12th, 1741, wherein a motion was made on behalf of the plaintiff, who was patron of the living, against the rector, for an injunction to stay waste in cutting down timber in the church-yard.

A rector may cut down timber for the repair of his ecclesiastical buildings, but not for common purposes.

To this application his Lordship replied, that a rector may cut down timber for the repairs of the parsonage-house or chancel, but not for any common purpose; and this he may be justified in doing under the statute of the 35 Edw. 1. stat. 2. A. D. 1307, entitled, *Ne rector prosternant arbores in cæmeterio*, which recites, "I. Because we do understand, that controversies do often grow between parsons of churches (c),

Lord Chancellor *Hardwicke's* decision thereon.

(a) Appendix, No. XXVII.

(b) Atk. Rep. vol. ii. p. 217, case 174.

(c) On this passage, Bishop Gibson says, "the difference between parsons and vicars, which case, namely, to which of those two the trees belong, was considered, but not determined, in the 13 James 1, where the vicar sued the parson impropriate in the Spiritual

Court, for cutting them down, and the suit being for damages, and an action of trespass lying at common law, a prohibition was granted, and afterwards upon the same grounds, a consultation denied. But what became of the same point, that is, to whom the trees of right belonged, appeared not. Only Sir Henry Rolle seems to make the right, turn upon

\* Gibs. Cod. tit. 9. cap. x. note ii.

† Roll. Abr. vol. ii. p. 337, *Bellamy's Case*, Mich. 13 James 1.



Trees growing in church-yards being the goods of the church,

and their parishioners, touching trees growing in the church-yard, both of them pretending that they do belong unto themselves: We have thought it good, rather to decide this controversy *by writing (a)* than *by statute*. Forasmuch as a church-yard that is dedicated, is the soil of a church, and whatsoever is planted, belongeth to the soil, it must needs follow, that those trees which be growing in the church-yard, are to be reckoned amongst the goods of the church, the which lay-men have no authority to dispose: but as the Holy Scripture doth testify, the charge of them is committed *only* to priests to be disposed of."

shall not be cut down, unless (with consent of parson) to repair the chancel or church.

"II. And yet seeing these trees be often planted to defend the force of the wind from hurting of the church; we do prohibit the parsons of the church, that they do not presume to fell them down unadvisedly, but (*b*) when the chancel of the

this, that they should belong to him who is bound to repair; which determination agrees well with what follows in this statute, that the parson shall not fell, but when the chancel wants reparations. But if in the same church there be both rector and vicar, it may be doubted, says Lyndewode\*, to whether of them the trees or grass shall belong. But I suppose, says this able commentator, they shall belong to the rector; unless in the endowment of the vicarage, they shall be otherwise assigned.

(a) Therefore Lord Coke calls this law a *treatise* only; and adds, that it is *but a declaration of the common law*.

(b) If it appears, says Bishop Gibson, in a note on this passage †, that the person whose right they are, intends to cut them down for other purposes; a prohibition will be granted, to hinder waste; and so likewise to hinder the cutting down of such trees

in church-yards as are *pro defensione ecclesie*. And if the trees be actually cut down by any person, for other use than is here specified, it is thought, says the Bishop, that he may be indicted and fined upon this statute.

In a visitation of Archbishop Warham ‡, a rector was enjoined, *Quid non acindat arbores crescentes in cimiterio, quæ sunt necessariae pro defensione ecclesie*. And not only so, but a vicar was enjoined §, *Quid non succidat arbores crescentes extra præcinctum cimiterii, neque alteras arbores stantes et crescentes prope viam processionalem existen' necessar' pro defensione ecclesie*, sub poena juris. It is remarkable, says Bishop Gibson, in the same note, that this statute was made the same year in which the famous resolution passed in parliament, that the Bishop of Durham, should be prohibited by writ out of Chancery, from *wasting the woods of his bishoprick*.

\* Page 267.

† Tit. 9. cap. x. note 1.

‡ Reg. Warh. fo. 69 a.

§ Ib. 68 b.

church doth want necessary reparations. Neither shall they be converted to any other use, except the body of the church doth need like repair: ~~in which case~~ the parsons of their charity shall do well to relieve the parishioners with bestowing upon them the same trees; which we will not command to be done, but we will commend it when it is done."

Lord *Hardwicke* then went on to say, that if it is the custom of the country, a rector may cut down underwood for any purpose, but if he grubbs it up, it is waste. He may cut down timber likewise for repairing any old pews that belong to the rectory; and he is also entitled to hotes for repairing barns and out-houses belonging to the parsonage.

A rector is entitled to hotes, for repairing barns and out-houses belonging to the parsonage.

Lord *Hardwicke* granted an injunction till the hearing of the cause, to stay the rector from cutting down timber, except in the particular instances before mentioned.

There is an important case, relative to the imperative nature of ecclesiastical dilapidations, expected to be argued before the Judges next Term, that is likely (I am informed on good authority) to form a novel feature in the practice of this department of our subject. Should it be determined before the publication of this work, it shall be given in the Appendix.

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## CHAPTER II.

### CIVIL DILAPIDATIONS.

*On Civil Dilapidations.—Divisions or sub-species.—Wherein differing from Repairs and Re-instatements.—Assessment of Dilapidations, how to be made.—Modes of surveying Dilapidations.—Penal Laws against.—When during the continuance of the Lease.—When near its expiration.—When after its expiration.—In Buildings voluntarily erected by Tenants.—Dilapidations commissive and permissive.—Manner of giving Notice.—Mode of Proceeding when Tenants neglect after due Notice.—Manner of taking Accounts &c. of Civil Dilapidations in the measuring Book, and reference to the Appendix.*

Civil dilapidations.

**C**IVIL DILAPIDATIONS, are of various kinds, which differ according to the nature of the tenure, under which the property dilapidated is held; according to the covenants of the leases, and according to other incidental circumstances; which several circumstances and particulars, should all be taken into consideration before the survey and valuation be commenced.

In most instances, *civil dilapidations*, are to be considered; rather as a composition to be paid as *dilapidation-costs*, for damage done to a tenement, in lieu of reparation, when the expenses of complete reparation would, according to the custom of landlord and tenant, be excessive. Civil dilapidations therefore are, *whatever state of repair a tenement may be in, worse than it ought to be*; and this state, which it is the business of the architectural surveyor, first to ascertain, and then to assess or value, is the great difficulty of this part of his practice, and which principally distinguishes it from *ecclesiastical dilapidations*.

Civil dilapidations are again divided into sub-species, of members of the main body, according to the nature of the tenure, the customs of the country, and the covenants of the lease.

**REPAIRS**, are the amendment of damage done to a tenement. Repairs.  
 To repair, is to amend by an equivalent, to make again, or to replace what has been destroyed. Practically it means a restoration of defects, an amendment of injuries, an again making fit for use, and a supply of deficiencies, occasioned by waste; such as broken floors, wainscots, walls, roofs or chimneys, paint, white-washing, papering and such like. Two sorts of.  
 Repairs are of two sorts, substantial and necessary. Substantial and necessary.  
*Substantial* repairs, are those to the main walls and vaults, the replacing of beams, girders, roofs and other main constructive timbers; buttresses, inclosing walls and other essentials of an edifice. All other separations are *necessary* repairs. Substantial repairs are mostly at the charge of the proprietor of the soil, unless they have been occasioned by the neglect of necessary repairs, and necessary repairs at those of the tenant or usufructuary.

**RE-INSTATEMENTS**, on the contrary, are the restoration of Re-instate-ments.  
 things that have been taken away, or rendered useless by fracture; as broken glass, sash-lines, locks, keys, hinges, shelves, doors, hearths, jambs or mantels of chimney-pieces, broken rafters, joists, floor-boards and such like; for it is a natural law, that he who commits damage or waste, should make restitution.

An architect or surveyor of buildings, employed to survey the state of repair in which any house or tenement may be in, should be furnished with the lease or counterpart under which it is held; so that he may become acquainted with the conditions, covenants and obligations of the tenants, and be able correctly to assess, value and make out a schedule of such necessary repairs or re-instateMENTS as may be requisite to be done, within the time specified in the lease, and according to the nature and custom of the tenure.

Dilapidations, of both kinds, are either *commissive* or *permissive*, of which the former is the greater offence; as it implies an active and wilful destruction, or perpetration of damage upon another's property, and is a direct infringement of the rights of persons, and of the ancient maxim, *quod tibi fieri non vis, alteri ne feceris*, do not to others, that which you would not have done to yourself.—Whilst the *permitting* Dilapidations commissive and permissive.

dilapidations to occur, is an offence of a more passive quality, that may sometimes arise from a culpable negligence, allowing that to be done, which perhaps he does not approve.

Penal laws  
against.

Penal laws against *dilapidation of tenements* are of very ancient date. The Emperor Justinian provides for the endowment and support of churches in his *Novellæ* (a), which with the rest of his admirable code and pandects, embraced the whole pith and marrow of the ancient Greek and Roman laws.

An offence by  
the early Eng-  
lish laws.

The dilapidation of tenements was, in the early part of our history, a punishable offence of no ordinary magnitude. Lord Coke says, in his invaluable *Institutes* (b) of the laws of England, that "it appears by the statute of 4th Hen. 4. c. 13, that *depopulatores agrorum* or depopulators of towns, were great offenders by the ancient law, and that the appeal or indictment ought not to be general, but in a special manner; and it provides that the offenders therein might have their clergy. They were called *depopulatores agrorum* in that statute, because by prostrating or destroying the houses of habitation of the king's people, they *depopulate*, that is, they dispeople the towns. It is also called *disinherison*" (c).

Modes of sur-  
veying dilapi-  
dations,

There are three modes of surveying dilapidations of tenements, namely,

- I. When during the existence of the lease.
- II. When very near its expiration, and
- III. When it has expired.

during con-  
tinuance of  
lease.

I. When the survey is made during the continuance of the term of years for which the lease is granted and the tenement held, under the powers of the usual covenants, "shall and will from time to time, and at all times during the term hereby granted, when and as often as need or occasion shall require, well and sufficiently repair, maintain, sustain, uphold, slate, tile, glaze, paint, cleanse, amend and keep in good order and condition, the said messuage or tenement, and all other erections and buildings now or hereafter to be erected or built on the said demised premises, and every part and

(a) Nov. 37. c. 2. lb. 123. c. 18.

(b) Co. 3 Inst. p. 204.

(c) See Architectural Jurisprudence, by the author of this work, p. 190.

parcel thereof, and all party and other walls and fences, roofing and tiling, pavements, glass and glazed windows, vaults, cellars, drains, sinks, cisterns, gutters, sewers, water-courses, privies, wydraughts and other the appurtenances to the same belonging, in, by, and with all needful and necessary reparations, glazings, pavings, purgings, scourings, cleansings, emptyings and amendments whatsoever, as often as occasion shall require (damages or accidents from or by means of fire excepted (a) and also shall and will in the third, and again in the sixth year of the said term hereby granted, paint all the outside wood and iron work of and belonging to the said premises twice in good oil colours, and in a proper and workmanlike manner; and once in the same term or before the commencement of the demise hereby made, in like manner paint the inside of the said premises, &c. &c. &c.”—“And likewise that it shall be lawful for the said A. B. his heirs and assigns, and his and their agent or agents, surveyor or surveyors, with or without workmen, at all seasonable times in the day-time, to come into and upon the said premises or any part thereof, to view and see the state and condition of the same, and to take an inventory or particular of the several things which shall then be set up, or in anywise fixed or fastened to, within, or about the said premises, and which are to be left, surrendered, and yielded up, at the end or other sooner determination of the said term, and of all defects, decays and wants of reparation then and there found, to give or leave notice in writing, under the hand or hands of the said agent or agents, surveyor or surveyors, at or upon the said premises, to and for the said C. D.” (tenant), “his executors, administrators or assigns, to repair and make good the same within the space of three calendar months then next following, within which said time he the said C. D. doth hereby for himself, his heirs, executors, administrators and assigns, covenant and agree well and sufficiently to repair and make good accordingly:”—when the survey, as I have just said is thus made during the continuance of the lease, then and in that case, a schedule or specification of repairs and re-instatemnts of damaged,

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(a) On this head, see Chapter IV. of this work.

decayed and dilapidated parts, according to an architect's survey, is the most efficient and beneficial way of taking them, both for landlord and tenant; because, the *former* will have his house benefitted and preserved by *timely* repairs, and the latter will enjoy the pleasures and benefits of a well-repaired house. On this report, and on due notice being given, according to the covenants of the lease, or to the customs of leaseholding, an action on the case will lie for non-performance. Such surveys ought to be made by skilful architects or surveyors of buildings, at least once in seven years, during the continuance of long beneficial building or repairing leases.

When near its expiration.

II. But if on the contrary, the survey be taken at or near to the expiration of the lease, that is to say, within the last twelve months of the term, according to the conditions or covenants of the lease or nature of the tenure, it must be made in *two ways*; for the law gives the tenant the privilege of repairing or re-instating during the continuance of his term, instead of paying a sum equivalent thereto, if he prefer it. Although, as he must surrender the tenement almost immediately after he has so repaired or re-instated them, it is not very probable that he would prefer it; for the better state of repair that the house is in at the time of re-letting, so much the greater rent will it of course be worth, and so much greater rent must he give when he renews his lease. These two modes of making the survey and report of condition of repairs, are first to draw up a schedule or specification of repairs or re-instatements as in the former instance, and then to make an estimate or assessment of a sum of money to be paid on the expiration of the lease by the tenant to his landlord, in default of his doing the repairs, as a compensation for the actual deteriorated condition that the tenement is in, worse than it ought to be, reasonable wear and tear excepted; and the tenant has a right to make his election, whether he will so repair or pay the amount assessed for dilapidations.

A compensation in this instance, the best for both parties.

But, when the survey be thus made, that is, at or near the expiration of the lease, a compensation in money, by way of dilapidation-costs, if I may so call them, will be the most beneficial to both parties; and for these very substantial reasons:—*first*, because the compensation will cost the tenant

much less than the repairs, which he ought in justice, and according to the covenants of his lease, to have performed at some period during its continuance; and *next*, that the money so received by the landlord or owner of the house, can be expended more beneficially, when added to that sum, which is intended to be expended upon the premises in consideration of a new lease, than the forced reparations, and the unwilling and often half-done patchings of the tenant by way of repairs. When repairs or a specific performance is either impossible, useless, or not beneficial to either party; a compensation in damages, in lieu thereof, to be assessed, is the best remedy both for landlord and tenant.

If there be an intermediate or under-tenant, between the principal tenant or tenant in chief and the landlord, and the tenant in chief takes a compensation from his under-tenant, he is bound to expend whatever sums he receives from the under-tenant, upon the necessary repairs and re-instatement of damages to the tenement, or pay over the same to his landlord, for whose use only he could receive it, and to whom he is responsible.

III. If, as in the former instances, the survey is ordered to be made, and the repairs are intended to be performed during the continuance of the lease, or a compensation demanded in lieu thereof; a notice, drawn up according to the covenants of the lease, and the custom of the tenure, will be necessary. But, for an assessment of dilapidation-costs, at the close of the lease, or after its determination, notice is not requisite for the purpose of maintaining an action against any incumbent, tenant or other occupier of another's inheritance, for the non-performance of the repairs to such property. Because, the notice refers only to reparations within the term, to the penalties of which the lessee is not liable, without the usual notice of three months, unless there are covenants to the contrary; as in leases that I have had under my care, in which it was expressly covenanted for six months notice; and also for the self-evident reason, that a covenant to repair during the term, after three months' notice, and to leave the premises in repair at the end of the term, are distinct clauses. Therefore a

When after the expiration of the lease.



notice, that dilapidations have been committed in and upon the premises, that is, that they have been suffered to fall into a worse state of repair than they ought to be, reasonable wear and tear excepted, unless it is expressly covenanted that they are to be left in complete repair, or, in as good a condition as when the lease was granted, is unnecessary to sustain an action for non-repair at the end of the term; for the notice, as *Woodfall* says (a), refers only to reparations within term, to which the lessee is not tied without notice being given three months before. The survey and estimate of the amount of dilapidation-costs, at the time of the expiration of the lease, should be made, for security-sake, as soon after that period as possible.

Yet it is but civil, as is often done, to give notice, that such a survey and valuation is intended to be made, on such a day, that the lessee or tenant may have the power, if he thinks fit, of appointing a surveyor to assess and value on his own behalf, or, to attend himself. It is only meant, in such case, that the law does not require such notice to be delivered in order to sustain an action.

Dilapidations  
in buildings  
voluntarily  
erected by  
a tenant.

It has been a question with some, whether dilapidations, repairs or re-instatements of damage done to buildings voluntarily erected by the lessee during the term of his lease, are to be taken and assessed. In answer to this it has been decided (b), that a general covenant to repair and to deliver up in repair, extends to all *estate* (c) buildings erected during the term. Therefore if a person takes a lease of a house and land, and covenants to leave the demised premises in good and substantial repair at the end of the term, and he erects another house upon part of the land, in addition to those which were there before, he must keep and leave this in good repair also.

(a) *Woodfall*, Chap. XV. Sect. 1.

(b) *Woodfall*, Chap. X. Sect. 2. and *Espinasse's Digest of Nisi Prius Actions*, vol. i. p. 277.

(c) I use this epithet "*estate*" buildings, in opposition to "all buildings,"

and to conform with Lord *Ellenborough's* clear distinction in the case of *Elwes v. Maw*, hereafter mentioned, as well as to distinguish them from those temporary or trade buildings that may legally be taken away.

An apparently harder case than this occurred in my practice a few years ago; in which the incumbent of a college living, pulled down the old parsonage-house and re-built a new one, on a larger scale, a better plan, and in a superior manner; and yet, at his death, the widow had to pay, as executrix, the amount of repairs then necessary, as much as if it had been the old-house. For an explanation of the law and practice on this subject, the reader is referred to the Chapter on Ecclesiastical Dilapidations, page 74.

As a farther illustration of this point of professional practice, Woodfall (a) cites, from *Bacon's Abridgment of Law and Equity* (b), where a lease was made of three messuages for forty-one years, in which the lessee covenanted "to pull down and erect three others in their places, and also to leave the said premises and houses thereafter to be erected, at the end of the term in good repair;" and afterwards the lessee pulled down the three houses and built *five*. He was bound to leave them all in good repair at the end of the term: for though in the first covenant he is bound only to repair the messuages agreed to be erected, yet by the last covenant he is obliged to leave in good repair the houses thereafter to be erected indefinitely, which extended to all houses that should be built upon the premises during the term of the lease.

As dilapidations are to be variously assessed, according to the laws and customs of various tenures; such as under ecclesiastical persons or bodies, corporations, freeholders &c. the covenants agreed to in the leases; yearly holding, tenants at will &c.;—it is incumbent on the architect or surveyor to make himself acquainted with the legal nature of the property, that he has to survey, before he commences operations.

By the custom of leaseholding, and by the laws which regulate landlords and tenants, the owner of any property leased to another, has a right to expect such property restored to him, at the expiration of the lease, in a state corresponding with what it was, when so let to him, reasonable wear and tear

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(a) Woodfall, Chap. X. Sect. 2.

(b) Bac. Abr. tit. Covenant.

excepted, unless it is covenanted to the contrary:—and in whatever state such property be in, worse than this, is dilapidation, waste or damage, to be replaced by re-instatement, or a compensation in money. For instance, if *Johnson* has a house or tenement worth 80*l.* a-year, which requires 200*l.* to be expended upon in necessary repairs to make it worth that annual sum, and lets it to *Thompson* for 40*l.* or 45*l.* a-year, on condition that he, the lessee, expends that sum upon it under the direction and to the satisfaction of his, the lessor's, architect or surveyor, in substantial repairs, and to deliver it up, at the end of the demised term, in as good plight and condition of repair as it was when these repairs were completed, it must be so repaired and delivered up—or a sum of money equivalent thereto paid in lieu of such dilapidations, waste, want of repair and re-instatements, which have been permitted to occur in and upon the said demised premises, to be valued as full repairs. For which purpose an action may be sustained, either in the spiritual court by canon, if under ecclesiastical jurisdiction, as before explained in the Chapter on Ecclesiastical Dilapidations, or at common law, if under civil tenure, as the case may be, and the amount recovered in law. The action may also be brought by the successor against the predecessor, if living, or, if dead, against his executors, administrators or assigns.

Building and  
repairing  
leases.

In a case where a building and repairing lease were granted together, with a covenant “to leave the demised premises, with all new erections well repaired,” the Court of King's Bench, in Lord Chief Justice *Mansfield's* time, the court being full, and the other Judges, being Sir *Thomas Denison*, Sir *Michael Foster* and Sir *John Eardley Wilmot*, decided, that it extended to the new buildings only; a sum of money being agreed to be expended in new erections and re-building, and the covenant “to keep in repair” was construed by the Bench as extending only to new erections.

*Lant v. Norris.* This case, as reported by Sir *James Burrows*, was that of *Lant v. Norris (a)*, and was an action of covenant brought by

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(a) *Burrows's Reports*, vol. i. p. 287.

*Robert Lant, Esq.* son and heir of *Thomas Lant, Esq.* against *William Norris*, administrator of *John Norris, Esq.* his late father, which *John Norris* was assignee of *Thomas Wilson*. It was founded upon an indenture of lease made on the 23d January, 1707, by the said *Thomas Lant*, deceased, of certain messuages, ground and premises, which are fully described in the lease, of the one part, and the said *Thomas Wilson* on the other part; whereby in consideration of two hundred pounds to be laid out in, upon, or about re-building upon the ground and premises thereby demised, and other covenants, the said *Thomas Lant* did demise to the said *Thomas Wilson*, all that piece of ground, and all the messuages, tenements, houses &c. thereon standing, in Suffolk Place, in the parish of St. George the Martyr &c. butted and bounded by, as described in the lease, from Christmas 1715, for forty-three years, at seventeen pounds a-year rent.

*Thomas Wilson*, the lessee, covenanted to lay out the said sum of two hundred pounds within fifteen years, in erecting and re-building of messuages or tenements, or some other buildings upon the ground and premises; and from time to time and at all times, all and singular the said messuages or tenements so to be erected, with all such other houses, edifices &c. as should at any time or times thereafter be erected &c. as in the lease, to repair &c. And the said demised premises, with all such other houses &c. so well repaired &c. at the end or other sooner determination of the said term, to deliver up &c. as in the lease. *Wilson* entered and took possession; *Thomas Lant* died 29th March, 1722, seised; and the reversion descended to *John Lant* his son and heir. On the 24th March, 1738, *Wilson* assigned the lease to *John Norris*, who entered; and on the 24th March, 1728, *John Lant* died seised, and the reversion descended to the plaintiff his brother and heir.

The action was brought for breaches of covenant, which were assigned to be, first, that after the term came to *John Norris*, and after the plaintiff became seised of the reversion, and whilst the said *John Norris* was possessed, namely, on the

Breaches of repairing covenants.

In May, 1743, the said John Norris permitted all the said demised messuages to be uncovered &c. by reason whereof the walls of the same demised premises were out of repair and goes on to state other damages, still calling them all along "*the said demised premises.*" Secondly, that the said John Norris did permit six messuages, parcel of the said "*demised premises*" to be prostrated; and to remain so till his death. Thirdly, that the said John Norris on the 1st of March, 1744, did pull down six other messuages then erected and built upon the said "*demised premises.*"

On the part of the defendant, the plea as to the first breach of covenant was, that the said Thomas Wilson or his executors did not within the prescribed term of fifteen years; nor at any other time, lay out the sum of two hundred pounds or any part thereof, in erecting or re-building of any messuages; and that the said messuages had never been re-built. As to the second breach, the same plea; and as to the third breach, "*non infregit conventionem.*" To all the breaches of covenant, the same plea to the first and second over again, "*that the said Thomas Wilson never laid out two hundred pounds;*" and "*that the messuages never were re-built,*" and "*that the said John Norris after he became assignee, and after the plaintiff became seised of the reversion, March 1st, 1753, he died intestate, so possessed, and administration was granted to the defendant, by virtue of which he entered; and being so possessed, before exhibiting the plaintiff's bill, namely, on the 24th June, 1754, assigned the said demised premises to one John Townsend, for the residue of the term, who entered and is possessed.*"

The plaintiff demurred generally to the first plea to the first breach, and also to the first plea to the second breach; especially to the first plea to the third breach; and generally to the last plea to all the breaches. There was also a plea of *non prostravit*, and a demurrer to it.

The plaintiff joined in demurrer to all the demurrers.

Mr. *Wren*, argued for the plaintiff, that the plots were not reserved, and that they neither confessed and avoided the charge in the declaration, nor denied it.

Mr. *Stodd*, contra, for the defendant, gave up the pleas; but he objected to the declaration, namely, that the intention of the parties was to confine the repairs to the buildings *then* upon the land to be erected; as it appears that there were no buildings of any consideration upon the land at the time of the lease; nor is there any averment in the declaration that the lessee, *Wilson*, "ever did erect any such." Which averments, he contended, ought to have been made, in order to have maintained this action; for without such erection, the defendant could not be obliged to repair; and a plaintiff must show every thing in his declaration that is necessary to maintain his action. The words "the said demised premises," he argued, must relate to those in the beginning of the covenant; and therefore only mean and intend "that he should leave them, that is, the newly-erected and re-built edifices, in repair at the end of the lease. The covenant is future, and the lessor could not have any action upon it, till the end of the term."

It appears by *Coke's Reports* (a), in *Sir Anthony Main's Case*, that if a man lets a manor for years, and the lessee covenants to keep the houses of the manor and whatsoever was within the manor in as good estate as he found them, during the term, and the lessee makes waste in the houses, and in cutting oaks, the lessor may bring an action of covenant before the end of the term for the oaks; forasmuch as but for them, it was impossible that the covenant could be performed; but it is otherwise, says the same high authority, of the houses. And with this opinion *Fitzherbert*, in his *Natura Brevium* (b), agrees, though if he fells timber &c. (if he commit waste in wood) he may have an action of covenant during the term; "for that" says *Fitzherbert*, "cannot be repaired." He likewise cited the case of *Greecot v. Green* (c), where the lessee

(a) Vol. v. page 31 a.

(c) Salkeld's Rep. vol. i. p. 199.

(b) 8vo edit. page 324, I.

covenanted for himself and his assigns to re-build and finish a house *within such a time*; and *after* the time was expired, the lessee assigned over the premises; the house *not* being then built and finished according to the covenant; and it was ruled by Chief Justice *Holt*, that this covenant shall not bind the assignee, *because it was broken before the assignment. Aliter*, if broken *after* the assignment; as if the lessee had assigned *before* the time had been expired; which case the learned counsel cited to prove "that the action did not lie in the present case, *because* the assignment was made *after* the fifteen years had expired."

Mr. *Winn* replied on behalf of the plaintiff, that the record was then to be considered as upon a general demurrer to the whole declaration, and said, that he would rely on the *first* and *second* breaches of covenant, and not on the third, which he confessed had received a proper answer by issue being offered.

Covenants, he said, are to be construed for the benefit of the *covenantee*, not of the *covenantor*. These are buildings demised, and the sum of two hundred pounds is agreed to be laid out in repair of *them*, or, in erecting *new* ones. Then there is a covenant "to repair the buildings *to be erected* on the demised premises; and the *said demised premises*, and *others* so to be erected, so being well and sufficiently repaired" &c. as in the lease, "to leave" &c. &c. This intimates, he argued, that the *demised* buildings, *as well as* the new erections, were to be kept in repair, and said, that there was sufficient, from whence to collect the intention and meaning of the parties to be so, which would amount to a covenant; and upon this general demurrer, he presumed, the court would not intend that the two hundred pounds was laid out only on the *other* buildings newly to be erected.

Lord MANSFIELD, *Chief Justice*.—I choose to look into it, and consider a little. No particular technical words are necessary towards making a covenant.

Sir THOMAS DENISON, *Justice*.—The question only is, whether the words "*demised premises*" are omitted by mistake in the former part of the covenant, or superadded by mistake in the latter; for there appears to be a mistake in either one or the other, in the deed itself. The lease is a building lease. Now the premises *then standing* were to be *pulled down*. Therefore it could scarcely be intended to repair *them*; the covenant "to repair" is confined to the tenements *to be erected*, and the covenant "to leave in repair" extends to the *demised premises, together with* all such other as shall be thereafter erected.

Sir MICHAEL FOSTER, *Justice*.—It is both a building and repairing lease.

In order, therefore, to look into the lease, according to Lord Mansfield's intimation, the case stood over, with a CURIA ADVISARE VULT.

On the next day, Lord MANSFIELD said, "We are extremely clear, that not only the words of the covenant, but also the *intent* of the parties manifestly shew that it was *not* meant that any of the money should be laid out on the *old* buildings; but, that they were to be pulled down; and that whatever he *should erect*, with the two hundred pounds, or otherwise, for his own convenience, should be kept in repair. The words '*demised premises*,' are put in *opposition* to the buildings that were to *BE erected* thereupon with the two hundred pounds; and the covenant '*to deliver up*,' is agreeable to this construction; that covenant being to leave '*the demised premises, together with all such other houses &c. as should be afterwards erected &c. so well repaired*.'"

"It is therefore clear against the plaintiff, upon the *first* and *second* breach of covenant; and Mr. *Winn* acknowledges it to be against him on the *third*."

Therefore the COURT gave JUDGMENT FOR THE DEFENDANT.



Breach of covenants in building lease, by repairing only.

In a similar case, where a person on a building lease covenants to *new build* the brick messuages on the premises, the *rebuilding some* and *repairing others*, is not sufficient to answer the covenant, but the lessee must rebuild the whole; and if he fail so to do, the lessor has his remedy for damages sustained by such non-performance, which is to be ascertained by survey and valuation.

*City of London v. Nash.*

In the case of *The City of London v. Nash*, argued and determined in the time of the Lord Chancellor *Hardwicke*, on the 25th May, 1747, and reported by Cursitor Baron *Atkyns* (a), the case, as stated by Lord *Hardwicke*, was as follows:—

The bill was brought by *The City of London* against *Nash*, to have a specific performance of an agreement for a building lease of some old houses near *Leadenhall Market*.

The points in the cause were, what is the true intent of the covenants in the lease and agreements entered into between *The City of London* and *George Greaves*, a builder, the original lessee, and whether the covenants were sufficiently performed?

Another point was made on the circumstances of fraud and misbehaviour in obtaining the lease, the defendant *Nash* being at that time a common-council man, and member of the committee for letting the city lands.

It appeared, that these were very old houses, and that *The City* having an intention, by their committee for letting the City lands, to let these premises in the year 1734, an order thereupon was made to survey them on the 1st of May, and it was reported by the surveyor, that they were much out of repair, and proper for a *repairing lease*.

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(a) *Atkyns Rep.* vol. iii. 512.

Now, the utmost term that the City can let houses on *repairing leases*, being one and twenty years, but, not being bound down for any certain time for building leases; the proposals for taking a *repairing lease*, were rejected and came to nothing. The consideration of these houses, was taken up again in 1736, and Mr. *Nash*, who was then a member of the committee for letting the City lands, was appointed to inspect them.

On the 8d of November, 1736, a report was made, to which the defendant *Nash* was a party, in pursuance of an order in May before, that the inspectors and surveyors were of opinion, that the houses ought to be re-built, as they were in a very bad and ruinous condition, and to which report Mr. *Nash* placed his signature in the first place. On the 4th November, 1736, an advertisement was ordered to be put into the public papers, that the premises were to be let on a *building lease* of sixty-one years.

Every one of these acts, said Lord *Hardwicke*, imported in the strongest manner a building lease.

Upon this, Mr. *George Greaves*, a builder, offered to give the City a thousand pounds fine, upon a sixty-one years lease; that proposal was accepted, and he was declared the best bidder. After this a draught of a lease was prepared, in which were these words, "the lessee to new build the premises, or any part thereof;" but it appeared that the words, "or any part thereof," were struck out in the draught, and left out in the original; the lease was to be approved by two of the committee-men, and was accordingly so approved by Mr. *Heaton*, a member of the committee, and the defendant *Nash*.

This lease was afterwards executed on the 8th February, 1736, and those words, "or any part thereof," being left out, proved, as the Lord Chancellor observed, that they had been under the consideration of the whole committee, and dropped by their express direction.

Mr. *Greaves* came into possession under this lease, and the first question was, *what is the true intent and meaning of the covenant?*

The counsel for the *City of London* insisted that the true intent and meaning of the covenant was, that all the messuages should be entirely *new built*, whereas but two had been new built and the rest repaired.

The counsel for the defendant *Nash* argued, that if he built new messuages, in the plural number, which must be two at least, and put the rest into repair, that it was sufficient to answer the covenant.

But Lord *Hardwicke* said, "I am of opinion the true construction is, that *all* the messuages should be rebuilt."

"Mr. *Greaves* covenants that he will new build the brick messuages on the premises, within the compass of three years."

"What can be the meaning of such a covenant? Why, to rebuild the whole, for an *indefinite proposition is equal to an universal proposition*, for had it been left to Mr. *Greaves's* discretion to build two, three, or four houses, it would have been so very uncertain, that it could never be the meaning."

His Lordship observed also, that "it was an omission that there was not a plan annexed to the lease, describing what sort of houses *Greaves* was to build;" and added, that ~~there~~ there could be any doubt upon the covenants, it must be considered upon the nature of the contract, and ~~what does it~~ import? A building lease even *by the term only*, ~~which is~~ *for* sixty-one years."

"Suppose an action at law had been brought," said the Lordship, "and in that action the city of London had assigned a breach of covenant, that *Greaves* had not performed the covenants in new building all the premises, and the action

### *Distinction between Building and Repairing Leases.*

defendant had pleaded that he had built two houses, *the plaintiff* must have had judgment, for building two only is not a performance of the covenant."

The distinction between a *building* and a *repairing* lease, appeared by the acts done by the city; for, on the two reports of repairs, that no person had appeared to make proposals, an advertisement was thereupon ordered for proposals to build, contract &c. "All this," said the Lord Chancellor, "spoke an intention of letting a *building* lease, in opposition and in contradistinction to a *repairing* lease."

Distinction between a building and a repairing lease.

It was also proved by Mr. *Dance*, the city surveyor, that on a repairing lease the City of London never let but for twenty-one years, but, if on a *building* lease for sixty-one years or more, and then all the premises must be new built.

Terms of the City of London leases.

But what greatly strengthened the case, in the Chancellor's opinion, was, the insertion of the words "*or any part thereof*," in the draught, and their being afterwards struck out: which shews that the City of London, seeing they would be an evasion, struck them out, to prevent any misapprehension in the sense of the lease.

The defendant therefore was now contending for the very thing which the city disagreed to, and disapproved of, before the lease was executed.

An observation was made on the part of the defendant, that there was no mention made in the advertisement, that all the premises were to be *new built*. Lord *Hardwicke* replied to this that "to be sure the true construction is, that all are to be *new built*."

The next question for his Lordship then was, whether that had been performed? He was of opinion that it had not; for that the defendant had done, was, to *build two new houses and to repair the old*; and though it was indeed a very large repair, for he had pulled down the fore and back fronts,

and new built them, and what he chiefly left were the floors and party walls, "yet," said his Lordship, "this is very different from new building of houses, for notwithstanding the new fronting of houses, they very often drop down afterwards, and therefore are not equivalent to houses entirely new built."

A great deal of evidence was read, to prove, that this was a substantial repair, and that the houses would be as good at the end of sixty-one years to let on a repairing lease as if they had been new built.

The witnesses varied, and Lord *Hardwicke* confessed that it was difficult to reconcile them, unless he took it in the sense in which it was sworn and explained by one of the witnesses, who swore that he could have built all these houses for an hundred pounds a house, *provided* he was not tied to a proper thickness of walls &c. and, said his Lordship, "I believe he might; but though Mr. *Greaves* was not confined to particular dimensions, yet, it must be understood that the whole ought to have been built in a proper workmanlike manner."

The next question was, what kind of decree the Lord Chancellor ought to make. It was insisted, at the beginning of the cause, *for the plaintiffs*, that they were entitled to a specific performance, and that *the defendant* ought to rebuild the houses which by necessary implication, would have imported, that the defendant was to pull down all the houses, which he had only repaired, and new build them.

To this, it was objected, *on the part of the defendant*, that the plaintiffs were not entitled to apply to the Chancellor for a specific performance, but ought to be left to their action at law.

Lord *Hard-  
wicke's* decree

Lord *Hardwicke* answered these by observing that "the objection would not hold; for upon a covenant to build, the plaintiffs are entitled to come into this court for a specific performance, otherwise on a covenant to repair; for to build

is one entire single thing, and if not done prevents that security which *the City of London* has for the rent by virtue of the lease."

"But the most material objection for the defendant," said the Chancellor, in pronouncing this important decree, "is, that the court is not obliged to decree a specific performance where it will be attended with great loss and hardship to one of the parties, and though not specifically performed, yet the defendant has laid out two thousand two hundred pounds, at least, in the repairs, and therefore to be sure has put them in a very good condition at present."

"Now if the defendant was mistaken in the sense of this covenant, or perhaps has even knowingly evaded it, still it would be hard to decree a specific performance, and such a decree, too, would be contrary to the good of the public, by pulling down houses, which from the evidence, chiefly appear to be in such a good condition, as that they may stand a great number of years."

"It would be of no service to *the City of London* to make such a decree, for all their want is to be compensated in damages, and therefore the court ought not to make a decree for a specific performance."

"But then it has been said on the part of the defendant, if so, there is no occasion for any other decree in this court, but the plaintiff should be left to law."

"Now though this is a covenant unperformed, and runs with the land, and will affect an assignee, yet if the breach was made before the assignment, it will not affect him, and if an action were brought against the representatives of *Greaves*, then they must come into court against *Nash* for an indemnity, and this would occasion a circuitry."

"So that the question will be, what the relief is, I ought to give, whether an action, or whether I shall direct an issue."

" I shall *not* direct an action, because all proper parties are before me, the representative of the original lessee, and the assignee of the lease, but, *I shall order an issue.*"

" It is evident to me, that the lease has been obtained in an improper manner, taken by *Greaves* as a trustee only for the defendant *Mr. Nash*, and appears to be plainly a beneficial lease. *Mr. Greaves* dies before the three years expire for building these houses, and his administrator assigns this lease, for the consideration of five shillings only, to *Mr. Nash.*"

" All the other circumstances shew that this was taken originally for *Mr. Nash's* benefit, because nobody can imagine that *Mr. Greaves's* representative would have assigned it over for so small a consideration as five shillings, if *Mr. Greaves* had ever had any beneficial interest."

Rule of the  
City lands  
committee as  
to leases.

" *Mr. Nash*, likewise, is a member of the committee of City lands, and all committee-men are expressly excluded from being a buyer or seller, which is a good rule, and I hope they will continue it, because it prevents fraud and collusion."

" This was a scheme of *Mr. Nash* to increase the term to sixty-one years, instead of twenty-one, and yet to do nothing more than to repair, notwithstanding the term in the lease is trebled; and though *Mr. Nash* has twice under his own hand reported they were in a very bad and ruinous condition, still he has thought proper to examine witnesses to prove they were in good a condition and fit to be repaired."

" I shall give more credit to his own report, than to his witnesses."

" The relief must be by way of inquiry of damages before a jury; and I am more inclined to this, than to decree a specific performance, because it appears upon a dispute of the extent of the buildings, that there was a formal committee, with *Mr. Dance, the surveyor of the City of London*, at the head of it, viewing the repairs, while the workmen were em-

played about it, and yet made no objection to Mr. Greaves going on, and therefore are too late in coming here for a specific performance, unless they had brought in a bill recently, and immediately after this survey."

Lord HARDWICKE therefore directed an issue to try what damages the Mayor, Commonalty, and Citizens of London had sustained, by the non-performance of the covenants in the lease to Mr. Greaves, and appointed THE CITY OF LONDON plaintiff, and NASH alone defendant.

When a tenement is suffered to be in a state of dilapidation, and notice is given to repair such dilapidations or abide by the consequences, and they are not done according to such notice, the lease is forfeited. This was determined by Lord Ellenborough in the case of *Goatley v. Paine*, tried before him in the Court of King's Bench, at Nisi Prius, in Michaelmas Term (December 11th), 1810. Mr. Campbell, in his Reports (a), states this case as follows: In an indenture of lease with a power of re-entry, there is a general covenant on the part of the tenant to keep the premises in repair; and it is farther stipulated by an independant covenant, that the tenant within three months from notice being served upon him by the landlord shall repair all defects specified in the notice: the landlord after serving him with a notice, may within the three months bring an ejectment against him for a breach of the general covenant to repair.

Dilapidations not repaired, after notice, forfeits the lease.

In this case, *Goatley*, the landlord, brought an ejectment for a house in Fetter Lane, on the forfeiture of a lease for a breach of the general covenant to repair. The demise was laid on the 2d of October preceding.

By an indenture of lease bearing date the 28th August, 1809, *Goatley* let the premises in question to *Paine* for twenty-one years, and *Paine* covenanted to keep them in repair during the term. It was likewise provided, "That it should be lawful for the landlord to give notice to the tenant to repair the premises within three months from the date of such notice, and if the tenant should neglect to do so, the landlord might bring an ejectment against him for a breach of the general covenant to repair."



for *Goatley* and his surveyor, with workmen, twice in every year, during the said term, at seasonable times, to enter the said premises to view the defects, and of all defects there found to leave notice at the said premises for the amendment thereof, and that *Paine* should within three months after such notice, repair all such defects of which such notice should have been given." The indenture contained the usual clause of re-entry.

It was proved that the premises were out of repair on the day of the demise. The defence was rested upon the effect of a notice, in the following form, which had been sent by the lessor of the plaintiff to the defendant, on the 10th of September preceding :

*Form of notice  
to repair.*

" In pursuance of a certain indenture of lease, bearing date 28th August, 1809, made &c." as in the lease ; " I do hereby give notice and require you forthwith at your own proper costs and charges, to put the premises demised by the said indenture of lease, and every part thereof, into good and substantial repair, agreeable to the covenant on your part and behalf contained in the said indenture of lease."

It was contended for the defendant, that the lessor of the plaintiff having given this notice, could not bring his ejectment till three months had expired.

*Notice no  
waiver of  
forfeiture.*

*Lord Ellenborough.*—The indenture contains a general covenant to keep the premises in repair. By breach of this, the lease was forfeited, and the notice was no waiver of the forfeiture.

The lessor of the plaintiff had a verdict.

*Mr. Park* was counsel for the lessor of the plaintiff, and *Mr. Gurney* for the defendant.

In surveying dilapidations that have been suffered to accrue in and upon certain messuages or tenements, being at the expiration of beneficial leases, the actual holder of the under-lease is bound to the original lessee, who alone is bound to the ground landlord, either to repair those dilapidations, and re-instate the damages, on notice being given him, accompanied by a schedule or specification of such necessary repairs and re-instatements, according to the time provided in the lease, which is sometimes three and sometimes six months, and if he neglect so to do, an action may be brought for the amount of the dilapidation, or an ejectment, or a writ of waste (a). This is, in fact, to ascertain *the actual state that the tenantable part of the property, at the expiration of the lease, is in, worse than it ought to be.* This state, in the case of tenants at will, and in those of leases with common covenants, is *reasonable wear and tear excepted*: in other leases the covenants are stronger, and the houses are agreed to be left in as good condition as they were when the leases were granted; which is sometimes in *perfect repair*, because they were so at the time of leasing, because let at a suitable low rent on a repairing lease, and covenanted so to be left.

Original leaseholder bound to the ground landlord for dilapidations.

In the case of *Buckley v. Pirk* (b), tried in the Court of King's Bench, Chief Justice Parker said, that a covenant to repair is a covenant that must run with the land, for it affects the estate of the term, and the reversion in the hands of any person that has it. If the covenant to repair, said the learned Judge, be on the part of the *lessor*, the rent is the greater; if the *lessee* be to repair, he pays the less rent; and as an assignee has the benefit, it is but reasonable that the assignee should be subject to the charge.

Covenants to repair.

Leases, in general contain the *express* covenants to repair, sustain, maintain, uphold &c. but even when they do not, it has been decided (c), that in the case of a house or other tenement, let without such covenants, it is *implied*, whether

Express and implied covenants.

(a) See Chapter IV. Waste.  
(b) Salk. vol. i. p. 317.

(c) Woodf. chapter x. sect. i. 4th edit.  
p. 244.

so *expressed* or *not*, that the tenant is bound to keep it in repair: and such is the case even with a tenant at will, for the tenant must in justice restore possession of the premises in as good a plight as possible, consistent with such deterioration as may be unavoidable.

Sir *Henry Rolle* (a), in his learned abridgment of cases and resolutions, says, there is no need of the word *covenant*, nor of any particular form of words to constitute a covenant in deed; for any thing under the hand and seal of the parties, importing an agreement, will support an action of covenant, as amounting to a covenant.

Tenants for life obliged to keep tenements in repair.

A tenant for life, though without impeachment of waste, is obliged to keep tenants' houses in repair, as determined by Lord *Hardwicke* in the case of *Parterichs v. Powlet* (b), on the 2d August, 1742, where an exception was taken to the Master's report, that he had charged the tenant for life, without impeachment of waste, with several sums for the repairs of houses upon the estate.

Lord *Hardwicke* over-ruled the exception, and said, notwithstanding tenant for life is without impeachment of waste, he shall be obliged to keep tenants' houses in repair, unless the charge is excessive, and not suffer them to run to ruin.

A mortgagee in possession obliged to necessary repairs only.

A mortgagee in possession is not obliged to lay out money any farther than to keep the buildings and other parts of the estate in necessary repair. This was determined by Lord *Hardwicke* in the case of *Godfrey v. Watson*, which came before his Lordship as Chancellor, on the 21st March, 1747, on exceptions to a Master's Report (c). To which his Lordship added, but if a mortgagee has expended any sum of money in supporting the right of the mortgagor to the estate, where his title has been impeached, the mortgagee may cer-

(a) Atk. vol. ii. p. 383.

(c) Atk. vol. iii. p. 517, Case, 184.

(b) Rol. Abr. vol. i. p. 518.

tainly add this to the principal of his debt, and it shall carry interest.

A yearly tenant is bound only to *tenantable* or necessary, and not to *substantial* or lasting repairs, like a tenant for years. These two kinds of repairs shall now be considered:—

Repairs.

*Tenantable repairs*, relate to the finishing and beautifying only, or to the *occupation* of a tenement, and not to its construction, which are the landlord's or lessor's repairs. Keeping out the wind and weather, as being necessary for *occupation* or *tenancy*, are therefore *tenantable* repairs, as well as papering, painting and such like. Materials, fixtures or other things removed or broken during tenancy are also considered as *tenantable* repairs or re-instatements, to be made by tenants, whether at will, by the year, or for a term of years.

Tenantable repairs.

*Substantial repairs*, on the contrary, as before mentioned in page 81, are indicated by their name, and relate to the entire construction as well as to the finishing and beautifying of a building.

Substantial repairs.

The case of *Ferguson v. ———* (a) sets these distinctions in a clear light. It was an action brought to recover damages, for suffering a house belonging to the plaintiff and occupied by the defendant to be out of repair. The defendant had rented a house of the plaintiff as *tenant at will*, at a rent of thirty-one pounds a year. After the defendant had given up possession, the house being found to be much out of repair, the plaintiff had it surveyed and an estimate made of the sum necessary to put it in *complete* and (as it appears erroneously, because instead of) *tenantable* repairs; and for this amount he brought his action. But Lord *Kenyon* said, "It was not to be permitted to the plaintiff to go for the damages so claimed. *A tenant from year to year was bound to commit no waste, and to make fair and tenantable repairs, such as putting in windows or doors that have been broken by him, so as to prevent waste and decay of the premises.*" Thus have

A case deciding between tenantable and substantial repair.

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(a) Esp. Rep. vol. ii. page 590.

we a legal definition of *tenantable repairs*, which are such as are necessary to prevent waste or decay of the premises. *Tenantable* repairs, though varying according to the tenure, never amount to *complete* repairs, which were what the plaintiff sought in this action. "For" as Lord *Kenyon* further observed, "the plaintiff in the present case had claimed a sum for putting on a *new roof* on an *old worn-out house*;" this his Lordship thought the tenant not bound to do, and that the tenant had no right to recover.

This action was clearly occasioned and lost, by the incompetency and ignorance of the person who made the estimate, mistaking *complete repairs*, or specific performances, for *dilapidations*, according to the tenure, or compensation for damages done or permitted, under the peculiar circumstances of the case. Hence the cause of the plaintiff's failure in this action.

On the most usual covenants, those for *repairs*, and to deliver up in good plight as lessee received the premises, on which so much depends for accuracy of assessing compensation for dilapidations, *Fitzherbert* (a) says, that if the lessee covenants to keep an house in repair, and to leave it in as good plight as it was at the time of making the lease; in this case the *ordinary and natural decay* is no breach of covenant; but the lessee is bound to do his best to keep it in the same plight, and so should keep it covered.

If a lessee pulls down houses, no action will lie till the end of the term.

And where there is this covenant on the part of the lessee, says the same learned authority (b), *if he pulls down houses, or suffers them to decay*, no action will lie against him, till the end of the term, for before that time, *he may repair them*: but if *he cuts down timber or trees*, an action of covenant will lie immediately, for *such cannot be replaced in the same plight*, at the end of the term.

General covenants extend to all buildings erected during a lease.

A general covenant *to repair, and to deliver up in repair*, extends to whatever buildings or erections that may have been

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(a) *Fitz. Abridg. tit. Covenant, fo. 6.*

(b) *Fitz. Nat. Brev.*

built during the term, and therefore dilapidations must be assessed on such.

This is exemplified in the case of *Douse v. Earle* (a), mentioned more fully hereafter, tried in the Court of Common Pleas, wherein *John* Earl of *Clare* demised, on the 9th December, 1647, to *Gale*, three messuages for forty-one years; and *Gale* covenanted to pull them down, and erect three others in their place; and also from time to time during the term, to maintain the messuages so agreed to be erected in sufficient repair; and also to repair the pavements, sinks, wydraughts &c. and to deliver them up at the end of the term in sufficient repair; or, as it runs in the original, "*Ac dicta dimissa præmissa ac domos superinde fore erecti et earum quamlibet ad finem sufficienter reparat' deliberaret*" to the said earl, his heirs and assigns, and he derives the reversion for a thousand years to the father of the plaintiff, who by his will devised the term of a thousand years to the plaintiff *Douse* for his life, the remainder to his son, and the heirs males of his body; and that the plaintiff by the devise was possessed of the said term for a thousand years, and then derived down the term of forty-one years to the defendant *Earle* as executor to *Gale*, and then assigns a breach of covenant, that the defendant permitted one messuage erected on the premises to fall quite down, and had also permitted four messuages erected on another part of the premises to be out of repair, and so left them at the end of the term.

*Douse*  
v.  
*Earle*.

The defendant pleaded, that *Gale* took down the three messuages, and erected three others, which the defendant left in repair; and as to the other messuages, that he left them in sufficient repair. Therefore the question was, when the lessee agreed to erect *three* messuages, and to leave them in repair, and he erects *five*, if in this case *he is bound to keep all the five messuages in repair?*

The whole Court, namely, Sir *A. Pollexfen*, Chief Justice, and *Powel*, *Rokesby* and *Ventris*, agreed that a *lessee* in such

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(a) Lev. Rep. part iii. p. 264. Ventr. vol. ii. p. 126, 127.

a case was bound to repair all the five messuages, and to leave them in repair; for though in the first covenant he be only bound to repair the messuages so agreed to be erected, which were three, during the term, yet by the last covenant, he is bound *dicta dimissa ac domos superinde erect'* (not agreed to be erected, but *superinde erect'* indefinitely) the houses so to be erected, which extends to all the houses which should be erected on the premises before the term expired, whether they were agreed before, to be erected or not. Also this last covenant is to leave them in repair at the end of the term.

The Court also held, that if a man took a lease of a messuage and land, and covenanted to leave the demised premises in good repair at the end of the term, and he erected another messuage on part of the land, he shall be bound to leave the messuage so newly erected by himself, in repair as well as the other. JUDGMENT for the plaintiff.

Where a lessee does not repair after survey and notice.

Where a right of entry is given in three months after notice of the premises being out of repair, acceptance of rent, after the expiration of the three months, does not prevent the plaintiff from bringing an action of ejectment, particularly if the premises are not repaired at the time of bringing the action.

*Fryett ex dem.  
Harris  
v.  
Jeffreys.*

This was settled by the verdict of a jury on a trial in the Court of King's Bench, on Monday, the 30th November, 1795, before Lord Kenyon, in the case of *Fryett* on the demise of *Harris v. Jeffreys*, wherein the plaintiff brought an action of ejectment against the defendant for a house in Dorset Court, Westminster.

The defendant *Jeffreys* was lessee of the house in question, under a lease of which several years were unexpired. By a covenant in the lease he was bound to repair, and inasmuch as he was not repairing within three months after notice, a right of entry was given to the plaintiff.

The plaintiff's counsel proved the lease, and notice of the want of repairs, which were specified in it at length, which

notice was dated the 18th April, 1795, and there rested their case; so that a right of entry accrued on the 18th of July following.

The demise in the ejectment was dated the 2d of November, and it was proved that the house was not then in repair.

The defendant gave in evidence a receipt of the *lessor* of the plaintiff's, for the rent up to Michaelmas, which receipt was dated the 18th of October.

For the defendant it was then insisted, that the receipt of rent, was a waiver of the plaintiff's right of entry; that, on the expiration of the three months after notice, the plaintiff's right of entry accrued, and of course, that from that time, the defendant was a trespasser; whereas the acceptance of rent was evidence of the continuance of the contract, and a waiver of the trespass.

Lord KERRON said, that had the demise in ejectment been *antecedent* to payment of the rent, he should have held the receipt of rent, a waiver of the trespass, and have nonsuited the plaintiff; but that in the present case, the demise in ejectment was on the 2d of November, which was *subsequent* to the receipt of rent. That though the plaintiff might have brought his ejectment at the end of the three months, there was no reason why he might not give an indulgence to the defendant, and bring his action even after the receipt of rent, particularly as the premises were not then repaired.

The jury found a verdict for the defendant. Messrs. Garrow and Wigley were counsel for the plaintiff. Messrs. Baldwin and Vaughan for the defendant. In the next Term a new trial was moved for, and a rule obtained, which the Court afterwards discharged.

An heir to an estate, although not named in the lease, may recover damages for dilapidations or neglect of repairs, although the *lessee* covenants with the *lessor*, his executors and administrators only; and for this reason, as laid down by *Fitz-*

An heir, although not named, may recover damages for dilapidation.



*herbert* (a), that real covenants, or such as are annexed to the estate shall descend, and the action be brought either by or against the heir or executor, according to the estate and time of the breach of covenant. As to the estate, he says, the heir shall have the action by reason of the reversion or injury to it.

*Lougher*  
v.  
*Williams.*

As in the case of *Lougher v. Williams* (b), tried in the Court of King's Bench, in the 25th Charles 2. wherein the plaintiff brought an action for breach of covenant as heir upon a lease granted by his ancestor of lands in Glamorgan-shire in the time of Queen Elizabeth for ninety-nine years. The lessee covenanted with the lessor his executors and administrators, to repair, and to leave the premises in repair at the end of the term; and now the heir brought this action against the executors of the lessee; whereupon the defendant demurred.

It was now argued by the counsel for the defendant, that the covenant being only with the lessor, his executors, and administrators, lies not for the heir, and cited *The Case of Richmond*, in *Owen's Reports*.

To this it was replied by the plaintiff's counsel that this was a covenant that runs with the land, and goes to the heir without naming him, as in *Spencer's Case*, and *The Dean and Chapter of Windsor's Case*, in the fifth volume of *Coke's Reports*. Also, the intent of the parties appeared to be, that the covenant should continue after the death of the lessor, it being with him and his executors, and therefore it did not determine by his death, as in *Sachaverel v. Frogat*, tried in the 33d of the same King, and reported also in *Levinz* (c).

Upon which JUDGMENT was given for the plaintiff. Sir CRESSWELL LEVINZ, the learned author of the *Reports*, whence this case was taken, was counsel for the plaintiff, and Serjeant JEYS for the defendant.

(a) *Stiz. Maxw. Stylian*, p. 242. (b) *Lev. part ii. p. 68. Stiz. 205.*

(c) *Part ii. p. 13.*

*Heirs may sue for Dilapidations.*

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An heir may bring an action for breach of covenant, for dilapidations suffered to accrue to the tenements, of which a part was in the time of his ancestor; but the damages can only be assessed at the amount actually required to re-instate them according to the covenants, at the time of the breach.

An heir may bring an action for dilapidations in his ancestor's time.

In the case of *Vivian v. Campion* (a), tried before Chief Justice Holt, in the Court of King's Bench, Easter Term, in the 4th of Queen Anne; the plaintiff as heir, declared on a covenant, that his ancestor *per indenturam suam, cujus alteram partem sigillo* of the lessee (omitting *sigillat*) *hic in curiam prefert*, did demise; and that the lessee covenanted to repair *from time to time, and to leave in repair*; and then shewed that his ancestor died in the 10th year of Wm. 3. and for breach of covenant assigned, that on the 1st of April, in the 3d year of our (then) present Queen (Anne) and for ten years prior thereto, the premises were out of repair.

*Vivian  
v.  
Campion.*

After the verdict had been obtained for the plaintiff, it was moved on the part of the defendant, in arrest of judgment; *First*, that the word *sigillat* was wanting. *Secondly*, that part of the ten years incurred in the life of the ancestor, and that this was a hard action.

Chief Justice Holt ruled, *first*, that the want of the word *sigillat*, was cured by the verdict, and the pleading over. *Secondly*, if the premises were out of repair, in the time of the ancestor, and continued so in the time of the heir, it is a damage to the heir: and the jury gave as much in damages as would put the premises in repair. But hereby no damages are given in respect of the length of time they continued in decay; but in respect of what it will cost at the time of the action brought to put the premises in repair; therefore *per se* the action was frivolous. He also said, that it was not a hard action; and that *good damages are always given in these cases because the damages recovered ought to be applied to the repair of the premises.*

(a) Vent. p. 108. Salk. vol. 1. p. 142. Mod. Rep. p. 651.

Therefore it is clear by this case, that where the covenant runs to *leave in repair at the end of the term*, the valuation, on which to bring the action for breach of covenant, ought to be taken, so as to be sufficient to put the premises in repair, at the time of bringing the action, and is therefore a *re-instatement of damages done to the premises, through want of repair*; rather than an *assessment of dilapidations* in the common covenants, when a calculation is to be made of what state the house is in, worse than it ought to be, according to the nature of the tenure, reasonable wear and tear excepted.

Actual occupiers bound to repairs &c.

It is so notoriously the duty of the actual occupier of a tenement, to repair, sustain, maintain and uphold the premises that he occupies, and so little the duty of the landlord, that, even without an agreement or covenant to that effect, the landlord may maintain an action against his tenant for neglecting such duty, the ground of the injury done to his inheritance. "And deplorable indeed," said Lord Kenyon, in the case of *Cheetham v. Hampson* (a), "would be the situation of landlords, if they were liable to be harassed with actions for the culpable neglect of their tenants."

*Cheetham v. Hampson.*

In this case, which was originally tried before Baron Thompson at Lancaster, it appeared that another person was tenant in possession under the defendant; and that it was objected that the action did not lie against the present defendant. The learned Judge would not nonsuit the plaintiff, and a verdict was taken for him; but he gave leave to the defendant's counsel to move the Court to set aside the verdict, and to enter a nonsuit, if they should be of opinion, that the objection was well founded.

A rule nisi having been, in Easter Term, 1791, granted, Mr. Law (afterwards Lord Ellenborough) on the 30th June, Trinity Term of the same year, shewed cause against it; and contended that from all the old authorities, it appeared that the burthen of repair lay upon the owner of the fee; and that the

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(a) Term Rep. vol. iv. page 319.

cases which shew that the occupier also is liable, only prove that the same burthen may be extended to him; but do not shew that the party injured by the neglect to repair may not elect to take his remedy against either. Nor is any hardship, he said, thereby imposed upon the owner; for if by his agreement with his tenant he has reserved to himself the burthen of repairing, it is but just that he should suffer for his own neglect; and if he has not, he has his remedy over against his tenant, who must be better known to him, than to a stranger.

The first instance, said Mr. Law, to be found of an action of this kind is that of *Star v. Rookesley* (a), where the prescription was, that the *tenants* and *occupiers* had repaired &c. In that case, the Court said, "that by the word *tenentes*, which is construed *tenants*, is meant *the owners of the fee-simple*, and by *occupatores*, those who come in under them,"

*Star*  
*v.*  
*Rookesley.*

That *tenentes* is so taken, appears by the writ *de curia claudenda*; which is a writ of right, and lies only for a tenant in fee; and as this (*Star v. Rookesley*) was a charge upon the land which runs with it, there was good reason why every occupier should be bound. "And that is sufficient (which rebuts the idea of its being necessary, observed the learned counsel) for the plaintiff to charge the *tenentes* and *occupatores*, because it is impossible that he who is a stranger should be able to know and set forth their particular estates, titles and interests;" but the prescription, said the learned Judge, who was quoted by Mr. Law, "is annexed to the *tenentes*, that is, to the tenants of the fee."

And in the case of *Rosewell v. Prior* (b), an action on the case was maintained against the owner, who was not in possession, for a nuisance in making an erection which stopped adjacent lights, and the Court held that the action lay either against him, or the tenant in possession, at the plaintiff's election. Again, in that of *Holback v. Warner* (c), two

*Rosewell*  
*v.*  
*Prior.*

(a) Salk. vol. i. p. 335.

(b) Salk. vol. ii. p. 460.

(c) Cro. Jac. 665.

Judges against one held the declaration in an action on the case for not repairing, to be bad, because the prescription laid was, that *omnes possessores* of such a close were bound to repair &c.; and the very objection was, because the prescription ought to have been laid in a tenant of the freehold, or in him who had the inheritance for that *terrarum tenentes*, in the old entries mean the owners of the fees.

Serjeant *Cockell* was about to argue on the contrary, but was stopped by the Court.

Lord *Kenyon*, Chief Justice. It is clear that this action cannot be supported against the owner of the inheritance, when it is in the possession of another person. It is so notoriously the duty of the actual occupier to repair, and so little the duty of the landlord, that, without any agreement to that effect, the landlord may maintain an action against his tenant for not so doing, upon the ground of the injury done to the inheritance. And deplorable indeed would be the situation of landlords, if they were liable to be harassed with actions for the culpable neglect of their tenants.

Mr. Justice *Ashhurst* declared himself to be of the same opinion, as did Mr. Justice *Buller*, who observed among other things, that "the simple question was, whether the landlord could in any sense be called a wrong-doer, because of the neglect of his tenant to repair."

Covenants and agreements.

As much of the practice of assessing dilapidations, giving notices to repair and such like, depend upon the nature of the covenants, it may be as well to consider a little the subject of covenants and agreements.

Covenants are either *implied* or *express*, that is, *in deed*, or *in law*.

*Covenants in deed*, says Lord *Coke* (a), are such as are expressly mentioned and recited in the agreement between the parties.

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(a) Co. 1st Inst. p. 80.

*Covenants in law*, says the same high authority, are such as the law raises or implies, though not expressed; as if the ~~lessee~~ *demises* to lessee by deed *for a certain time*, the law always implies a covenant on the lessors that the lessee *shall quietly enjoy during the term*. Therefore *covenants in deed* are *express covenants*, and *covenants in law*, *implied covenants*.

These *implied covenants*, says Woodfall (a), are said to be inherent, and are in all cases, controlled within the limits of an *express covenant*; and caution, he observes, is therefore to be used in introducing into a lease express covenants in certain cases; as the evil intended to be guarded against, may frequently be prevented or recompensed in a more limited degree, by an *express*, than by an *implied* covenant.

The distinction, he farther says, between *implied covenants* by operation of law, and *express covenants*, is, that express covenants are to be taken more strictly (b).

A breach of covenant, by a lessee, for non-performance of repairs, may be remedied by the landlord, by an action of *covenant* or of *assumpsit* (c); according as the premises are demised by deed or not, which will lie for the recovery of damages for any injury sustained by the landlord, in consequence of the tenant neglecting to repair the buildings, suffering trades to be carried on therein contrary to his covenant, treating the land in an unhusband-like manner, or committing any other breach of his agreement.

A landlord's remedy for want of repairs.

It should be remembered, that an action of covenant for dilapidation or want of repairs, cannot be maintained, except upon a deed, and the declaration must shew that it is brought on one (d).

(a) Woodf. Land. and Ten. chap. x. § I.

(c) Woodf. Land. and Ten. chap. xv. § I.

(b) Burr. Rep. vol. iii. p. 1639.

(d) Lord Raym. vol. ii. p. 1536.

Breaches of  
covenant to  
repair.

Leaving the glass of windows cracked has been held to be a breach of covenant to repair (*a*). So, not repairing a pavement is a breach of covenant to leave the premises sufficiently maintained and repaired: for it is within the intention of the covenant, and is *quasi* the building; and the not repairing may be a matter of value and of much prejudice to the lessor. So, carrying away a shelf, though not stated to be a fixture, has been held to be a breach of covenant to leave the premises in the same order &c.; for it shall be intended to be fixed (*b*).

A covenant to repair during the term after three months notice, and to leave the premises in repair, at the end of the term, are distinct clauses: therefore notice is not necessary to sustain an action for non-repair at the end of the term; for the notice refers only to reparations within term, to which the lessee is not tied without notice three months before (*c*).

But a covenant to keep a house in repair from and after the lessor hath repaired it, is conditional, and it cannot be assigned as a breach of covenant, that it was in good repair at the time of the demise, and that the lessee suffered it to go to decay; for the lessor must repair before the lessee is liable (*d*).

For the same reason the law is, that if a man leases a house to another for life or years, either by deed or by parole, the lessor is not bound to repair it, without an agreement or covenant for that purpose; but the lessee, who had the use of it, ought to do so, though he might not be subject to an action at the common law for not repairing it, as laid down in the *Countess of Shrewsbury's case* (*e*). But now by the act of the 6 Edw. 1. c. 5, commonly called the Statute of Gloucester, the lessor, says Serjeant *Williams*, in one of his notes to the case of *Pomfret v. Ricroft* (*f*), may have an action of waste,

(*a*) Woodf. Land. and Ten. chap. xv.  
§ 1.

(*b*) Saund. vol. i. p. 291.

(*c*) Ibid. 644.

(*d*) Woodf. Land. and Ten. chap. xv.  
§ 1. Saund. vol. i. p. 645.

(*e*) Co. Rep. vol. v. p. 13 b.

(*f*) Saund. vol. i. p. 325, n. 7.

or upon the case in the nature of waste, against the lessee, if he permits the house to be out of repair, unless it was ruinous at the time of the lease (a).

In surveying the dilapidations, or want of repairs to a tenement, the accessorial buildings must be taken into consideration, as well as the principal edifice. Accessorial buildings are minor structures, in addition to or connected with the principal or estate building, and belong in some cases to the lessor, and must be surveyed and included in the estimate and notice to repair, or assessment of damages; and in other cases to the tenant, and must be omitted. In the former case, the accessorial buildings must be left on the estate, and kept in repair as well as the principal; but in the latter they may be removed under certain restrictions, although the accessories may be often more valuable than the principal to which they have been added.

Dilapidation  
of accessorial  
buildings.

The case of *Lawton v. Lawton* (b), argued before, and determined by Lord Chancellor *Hardwicke* on the 14th December, 1743, embraces so much learning, and gives so clear an historical account of the progress of the law on this subject, that it cannot be too attentively considered.

*Lawton*  
v.  
*Lawton.*

The material question in the cause was, whether a fire-engine set up for the benefit of a *colliery* by a tenant for life, was to be considered as *personal estate*, and go to his executor, or as *fixed to the estate*, and go to a remainder-man; or in less technical language, whether it belonged to the land-lord or the tenant.

There was evidence read for the plaintiff, a creditor of the tenant for life, to prove that the engine was worth, to be sold, 360*l.*, and that it was customary to remove them. That in building of sheds, or *accessorial buildings*, for securing the engine, they leave holes for the ends of the timber, to make it more commodious for removal, and that they are very capable of being carried from one place to another.

(a) Co. 1st Inst. 54 b.

(b) Atk. vol. iii. p. 13.



The counsel for the plaintiff said, that the testator was dead, greatly indebted, and it would be hard, when he had been laying out his creditor's money in erecting this engine, that they should not have the benefit of it, but that the strict rule of law should take place.

Mr. *Wilbraham* compared it to the case of a cyder mill, which is let very deep into the ground, and is certainly fixed into the freehold; and yet Lord Chief Baron *Comyns*, at the assizes at Worcester, upon an action of trover brought by the executor against the heir, was of opinion, that it was personal estate, and directed the jury to find for the executor.

Evidence was produced on the part of the defendant, to shew that the engine could not be removed without tearing up the soil, and destroying the brick-work.

Mr. *Clark*, of counsel for the defendant, cited *Finch*, fol. 135, under the head of *Distress*; and the case of *Wortley Montague v. Sir James Clavering*, about two years previous, before Lord *Hardwicke*.

The Lord Chancellor (*Hardwicke*) then stated and determined the case as follows:—

This is a demand by a creditor of Mr. *Lawton*, who set up the fire-engine, to have the fund for payment of debts made as large as possible.

It is true the Court cannot construe the fund for assets, further than the law allows, but they will do it to the utmost they can in favour of creditors.

This brings on the question of the fire-engine, whether it shall be considered as personal estate, and consequently applied to the increase of assets for payment of debts.

Now it does appear in evidence, that in its own nature it is a personal moveable chattel, taken either in part or in gross, before it is put up.

But then it has been insisted, that fixing it in order to make it work, is properly an *annexation* to the freehold.

To be sure, in the old cases, they go a great way upon the *annexation* to the freehold, and so long as Henry the Seventh's time, the courts of law construed even a copper and furnaces to be part of the freehold.

Since that time, the general ground that the Court have gone upon of relaxing this strict construction of law is, that *it is for the benefit of the public to encourage tenants for life, to do what is advantageous to the estate during their term.*

What would have been held to be waste in Henry the Seventh's time, as removing wainscot fixed only by screws, and marble chimney-pieces, is now allowed to be done.

Coppers and all sorts of brewing vessels, cannot possibly be used without being as much fixed as *fire-engines*, and in brew-houses especially, pipes must be laid through the walls, and be supported by walls; and yet, notwithstanding this, *as they are laid for the convenience of trade, landlords will not be allowed to retain them.*

*This being the general rule*, consider how the case stands as to the engine, which is now in question.

The general rule as to accessories.

It is said, there are two maxims which are strong for the remainder-man: *first*, that you shall not destroy the *principal thing*, by taking away the *accessory* to it.

This is very true in general, but it does not hold in the present case, for the walls are not the principal thing, as they are only sheds to prevent any injury that might otherwise happen to it.

*Secondly*, it has been said, that it must be deemed part of the estate, because it cannot subsist without it.

*Principal and accessory, a question of major and minus.*

Now *collieries* formerly might be enjoyed before the invention of engines, and therefore this is only a question of *major* and *minus*, whether it is more or less convenient for the colliery.

There is no doubt but the case would be very clear as between *landlord* and *tenant*.

It is true, that the old rules of law have indeed been relaxed chiefly between *landlord* and *tenant*, and not so frequently between an *ancestor* and *heir at law*, or *tenant for life* and *remainder-man*.

But even in these cases, it does admit the consideration of public conveniency for determining the question.

I think even between ancestor and heir, it would be very hard that such things should go in every instance to the heir.

One reason that weighs with me is, its being a mixed case between enjoying the profits of the land, and carrying on a species of trade; and, considering it in that light, it comes very near the instances in brew-houses &c. of furnaces and coppers.

The case too of a cyder mill, between the executor and the heir, mentioned by Mr. *Wilbraham*, is extremely strong; for though cyder is part of the profits of the real estate, yet it was held by Lord Chief Baron *Comyns*, a very able common lawyer, that the cyder mill was personal estate notwithstanding, and that it should go to the executor, and not the heir.

It does not differ in my opinion, *whether a shed over such an engine be made of brick or wood*, for it is intended to cover it from the weather and other inconveniences.

This is not the case between an ancestor and an heir, but an *intermediate* case, as Lord *Hobart* calls it, between a tenant for life and remainder-man.

Which way does the reason of the thing weigh most, between a tenant for life and a remainder-man, and the personal representative of tenant for life, or between an ancestor and his heir, and the personal representative of the ancestor? Why, no doubt, in favour of the former, and comes near the case of a common tenant, where the good of the public is the material consideration, which determines the Court to construe these things *personal estate*; and is like the case of *emblements*, which shall go to the executor, and not to the heir or remainder-man, it being for the benefit of the kingdom, which is interested in the produce of corn and other grain, and will not suffer them to go to the heir.

It is very well known, that little profit can be made of coal-mines without this engine; and tenants for lives would be discouraged in erecting them, if they must go from their representatives to a remote remainder-man, when the tenant for life might possibly die the next day after the engine was set up.

These reasons of public benefit and convenience weigh greatly with me, and are a principal ingredient in my present opinion.

Upon the whole, I think this fire-engine ought to be considered as part of the personal estate of Mr. *Lawton*, and go to the executors for the increase of assets; and *his Lordship decreed accordingly.*

In surveying or assessing dilapidation damages, or want of reparations to agricultural buildings, the architect should remember that tenants in agriculture, who had erected at their own costs, and for the more necessary and convenient occupation of their farms, any buildings of brick and mortar, covered with tiles or slates and let into the ground, cannot remove the same, even during the term, and although they should leave the premises in the same state as when they entered. Therefore dilapidations are to be assessed on such buildings, as well as upon those originally demised by the

Agricultural  
buildings not  
removeable.

lease;—for it is a legal maxim of very ancient date (*a*), that whatever is adjoined to, or becomes an adjunct to a principal to which it is adjoined. This legal adjunction also applies to the fitting up of another man's house as well as building upon another man's soil. As if I build a house upon *Smith's* freehold, the principal is in him, and the adjunction in me; he is the proprietor, and I am merely the usufructuary; for the property of the thing is lost so long as adjunction continues. Thus the houses in Russell Square, are adjunctive to the freehold of the Duke of *Bedford*, and at the expiration of the building leases, the usufruct and adjunction cease, and they become the sole property of his Grace, on whose soil they are built.

With the Romans the law was the same, and the word *adjunction* is drawn from their civil code, where it implies, adding to the soil more than was originally upon it. The *ground* was called the subject, and the *building* the accessory or adjunct. These wise legislators had many species of *adjunction*, which they defined generally as something, added to the subject, more than it possessed before.

So also with the French, in their *Code Napoleon* (*b*), which says, that all buildings, plantations and works upon the soil, or beneath the surface, are presumed to have been made by the proprietor at his own expense, and to belong to him, until the contrary be shown; without prejudice to the property which a third person may have acquired, or may acquire by prescription, whether it be a vault beneath the building of another, or any part of the building.

Again (*c*), when plantations, buildings and works have been made by a third person, and with his own materials, the proprietor of the soil has a right either to retain them, or to oblige such third person to remove them.

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(a) Si quis in alieno solo ex sua materia domos, cujus et solum est. Just. Inst. l. i. tit. 1. § 30.

(b) No. 553.

(c) No. 555.

Besides houses built by persons on the freeholds of others, which are adjunctions, there are also adjunctions of chattels to houses already built, in the nature of finishings, which also become the property of the owner of the house; for the mere act of adjunction makes the materials themselves to become a part and parcel of the freehold, and it would become a trespass in law to remove them. This is therefore a point of law highly necessary for the architect to make himself acquainted with. Adjunctions, says Mr. *Hargrave*, in his notes to *Coke's First Institute*, is rather a term of the logicians. The *accessorium* of the civil law answers best to our terms of *regardant*, *appendant*, *appurtenant* and *incident*.

Other sorts of adjunction.

The architect therefore will do well to consider, that this makes the true legal difference between adjunctions and fixtures, that *the latter* by recent decisions, may, under certain circumstances, be removed and taken away, but that *the former* can in no case be removed without incurring the penalties of a trespass, *de bonis asportatis*. And also, that the owner of the reversion, if such adjunctive finishings be removed, whether they were added under the powers of a repairing lease, or the lease of an unfinished house, may support an action of trover for their recovery, if removed either during the continuance of the lease, or at its termination. This was fully exemplified in the case of *Farrant v. Thompson (a)*, in which certain mill-work and machinery had been demised with the mill for a term, and the tenant, without permission of his landlord, severed the machinery from the mill, which was afterwards seized and sold under an execution against the tenant: it was held that the property in the machinery instantly vested in the landlord, when separated by the wrongful act of the tenant; and that the landlord was entitled to his remedy as before stated.

Legal difference between adjunctions and fixtures.

Another species of buildings, that may be termed accessory buildings, is necessary to be considered by the architect in surveying dilapidations on a large estate. These buildings are a sort of minor structures or offices in addition to the

Accessory buildings.

(a) Barn. & Ald. vol. v. p. 326; and Appendix, No. XXVIII.

principal or estate building, and it must be remembered, that these accessorial buildings in some instances belong to the landlord, and in others to the tenant. He must therefore be particular in ascertaining these facts, before he commences his survey, that he may properly assess dilapidations or want of repairs, if they belong to the landlord, and are dilapidated or wasted, or omit them if they belong to the tenant, for an error in either case would be fatal to his demand if brought into Court. If these accessorial buildings belong to the landlord, they must be left on the freehold, are liable to dilapidation costs, and must be kept in repair by the tenant or usufructuary as well as the principal building; but if they clearly belong to the tenant, they may be removed under certain restrictions, although they should be of more value than the principal.

Lord Chancellor Hardwicke's opinion on such buildings.

In the before-mentioned case of *Lawton v. Lawton*, Lord Hardwicke, in giving his judgment, thus clearly explained the principle of the rule of law respecting such buildings. "To be sure," said his Lordship, "in the old cases they go a great way upon the annexation to the freehold; and so long as Henry the Seventh's time, the Courts of Law construed even a copper and furnace to be part of the freehold. Since that time, the general ground that the Courts have gone upon, of relaxing this strict construction of law is, *that it is for the benefit of the public to encourage tenants for life to do what is advantageous to the estate during their term.*"

Laws of the Romans on this head.

Among the Romans, all buildings were reckoned as accessions or accessories to the soil, the landlord being reckoned the owner or proprietor of the soil, and the tenant or usufructuary of the accessorial buildings; and with them, when a man built on his own proper soil with another's materials, he was understood to be proprietor of the building, because all that is built on his soil gave place to and went with the soil (a). The

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(a) "Cum in suo loco aliquis aliena edificatur, solo credit." Just. Dig. lib. xli. tit. 1. leg. 7. § 10. intelligitur edificat, quia omne quod in-

Romans also considered as accessories, those things that we call *landlord's fixtures*, or such as cannot be removed by the tenant. For instance, if a man sells his house, the glass windows, chimney-pieces and other fittings, go with it, as accessories, and may thus be well distinguished by the architect from the tenant's fixtures (*a*). Wainscot, benches, doors, windows, chimneys and the like, are accessories to a building, and are to be considered by the architect in making his survey, as part and parcel of the freehold, and pass, says my Lord Coke (*b*) by bequest, conveyance or lease of the house.

This affixing or adjunction of permanent buildings to estates, of temporary buildings to others, or of materials to buildings is also called by some writers, annexation, which is the permanent annexing or affixing fixtures, chattels, finishings &c. to a building, so as they cannot be legally removed. Thus, for instance, timber used in the repairs of a house, becomes so annexed, and legally inseparable from the property, that it becomes for ever after, a part and parcel of the house, and the property of its owner. Whenever a chattel, fixture or any other thing is so annexed to a freehold house, as to become a part and parcel of such freehold, or cannot be removed without doing damage to the freehold, it cannot be removed by the annexor or usufructuary without rendering himself liable to an action of damages: for by the act of annexation it becomes a portion of the freehold, that is, the annexation or accession, becomes part of the principal (*c*).

The following authorities are admitted by the lawyers on this subject; namely, the statute 10 Hen. 7. pl. 2; 20 Hen. 7. 13; 20 Hen. 7. 26; *Coke on Littleton*, p. 53 *a*; also Mr. *Hargrave's* and Mr. *Thomas's* notes (*d*), which is treated on more at large

Authorities.

(*a*) Bartolus says, on a law of the Digests concerning this subject, "*Ædibus distractis, vel legatis, ea esse ædium solemus dicere, quæ quasi pars ædium, vel propter ædes habentur, ut putà puteal.*" Just. Dig. lib. xix. tit. 1. leg. 13. § 31.

(*b*) Co. 1st Inst. fo. 53 *a*.

(*c*) "*Accessio cedit principali.*"—Gothofred. Gloss. in Just. Dig. lib. xxxiv. tit. 2. leg. 19. § 12.

(*d*) *Thomas's Systematic Arrangement of Coke's 1st Inst.* vol. iii. c. 53. p. 233.



in the 4th Chapter of this Treatise. *Lord Coke's Reports*, vol. iv. p. 68; *Bulstrode's Nisi Prius Reports*, p. 34; *Ambler's Reports*, p. 113; *Atkyns*, vol. iii. p. 13 (a); *East's Reports*, vol. iii. p. 50; *Taunton's Reports*, vol. vii. p. 190, and Professor *Amos* and Mr. *Forard's Law of Fixtures*, tit. *Annexation*.

How a tenant  
may avoid the  
effect of this  
law.

As it often comes within the architect's province, to build on or make additions to a leasehold estate, where it may be wished both by the owner of the soil and the usufructuary or tenant, that a portion of the new or additional buildings should be considered to be the property of the tenant; he should bear in mind that he may so design and construct his buildings, that they can never be legally considered as annexed or appertaining to the freehold; and apply his fittings and other ornamental finishing to tenements, so as not to become the landlord's fixtures. For if they be not absolutely annexed to the principal or realty, or annexed to the freehold by means of nails, bolts, mortar or the like, they will be taken in law, as mere loose and moveable chattels. And it has been decided (b), that if a tenant erects any barns, granaries, stables or other accessory buildings, upon blocks, rollers, stilts, pattens, columns or pillars, not annexed or let into the ground, the landlord is not entitled to consider them as part of his freehold. A tenant therefore, by constructing his accessorial buildings, in these or other similar methods, may make useful and valuable additions to his premises, without either having to leave them behind, at the expiration of his lease, or be liable to be sued for dilapidations or want of repairs, under the covenants of keeping in repair all buildings erected and to be erected during his term. For if they be so constructed, they will be moveable chattels, and not annexed buildings.

Appurte-  
nances.

Another sort of property that usually appertains to the proprietor of buildings, is that known to lawyers by the name of *appurtenances*, and ought to be well understood by the architect

(a) *Lawton v. Lawton*.

p. 19, 20. *Vin. Abr.* vol. ii. p. 154.

(b) *East's Rep.* vol. iii. p. 55. *Esp. Bul. N. P.* p. 34. *Barn. & Ald.* vol. iii. *N. P. C.* p. 160. *Taunt.* vol. i. vol. ii. p. 165.

when making a survey of dilapidations, want of repairs and such like deteriorations to an estate, or in making a schedule or terrier of the property belonging to either landlord or tenant on an estate. Appurtenances, therefore, are those inferior portions of a tenement that appertain to the principal; such as out-houses, orchards, yards and gardens, which are appurtenances to a messuage. Appurtenants are different from appendants, says Lord Coke (a), for appendants are ever by prescription, and appurtenances may be created in some cases at this day. To which Mr. Thomas, the learned editor of the last edition of Coke, says, that a thing *appendant* is that, which beyond memory has belonged to another thing more worthy, which agrees with it in nature and quality. A thing *appurtenant* is that which commences at this day. If a thing which may be appendant or appurtenant, had always passed with the manor to which it belongs by the words *cum pertinentiis*, it must be taken to be appendant (b). One messuage however cannot be appurtenant to another, and where a person hath a messuage, says my Lord Coke (c), which has rights of appurtenances, and it is blown down or burned by the hand of God, if the owner should rebuild it in the same place and manner, he will be entitled to the ancient appurtenances. A turbary, for instance, may be appurtenant to a house, and a seat in the church; but the latter cannot be appurtenant to land, for the principal and appurtenant, says a good authority (d), must agree in nature and quality.

In surveying the dilapidations &c. of a brewery, or rather of the buildings erected for the purpose of a brewery upon an estate, the architect should bear in mind that such erections are generally liable to the same laws as those elsewhere mentioned for agricultural and trade buildings, and that they may be removed by the tenant, if constructed in the manner before directed for such structures.

Brewery buildings how far liable to the law of dilapidations.

(a) Co. 1st Inst. fo. 121 b.

(c) Co. Rep. vol. iv. p. 86.

(b) 1 Roll. Rep. p. 230. Com. Dig.

(d) Salk. Rep. vol. iii. p. 40.

p. 530.

These cases, wherein I have been  
 concerned, repairs or re-instatements of  
 buildings erected by a tenant during the term  
 were assessed, or whether they  
 were down and taken away. But it has  
 been a general covenant to repair, and to  
 extend to whatever (estate) buildings  
 were raised during the term. This was ex-  
 pressed in the quoted case, ante, p. 107 (b), of *Douse*  
 where it appeared that *John* Earl of *Clare* de-  
 manded three messuages for forty-one years, and that  
 the defendant pulled them down, and erect three others in  
 their place, and also from time to time during the term, to main-  
 tain the messuages so agreed to be erected, in sufficient repair,  
 and to repair the pavements, sinks, wydraughts &c. to the  
 messuages, and heirs and assigns, and he derives the reversion for  
 twenty years to the father of the plaintiff, who by his will  
 gave the term of a thousand years to the plaintiff for his  
 life, the remainder to his son and the heirs male of his body;  
 and the plaintiff by the devise was possessed of the said  
 term for a thousand years, and then derived down the term of  
 forty-one years to the defendant, as executor to *Gale*, and then  
 alleged a breach that the defendant permitted one messuage  
 erected on the premises to fall quite down, and had also per-  
 mitted four messuages erected on another part of the pre-  
 mises to be out of repair in the tiles and windows, and left  
 them so at the end of the term.

The defendant pleaded, that *Gale* took down the three  
 messuages, and erected three others, which he left in repair;  
 and as to the other messuages, that he left them in sufficient  
 repair.

(a) Esp. N. P. vol. i. p. 328.

(b) I have briefly quoted this case  
 before, as elucidatory of general cove-  
 nants, but have given it fully in this  
 case, as illustrating the peculiar point,

that buildings erected by tenants must  
 be kept free from dilapidations, except  
 in certain cases hereafter given.

(c) Lev. Rep. part iii. fo. 264.—  
 Ventr. vol. ii. p. 126.

The question therefore, was, when the lessee agreed to erect *three* messuages and to leave them in repair, and he erects *five*, if in such case he is obliged to keep all the five messuages in repair.

Covenant to erect three messuages on the land, and to repair the premises; if the tenant erects five messuages, he is liable to dilapidations for the whole.

The whole Court, consisting of Chief Justice *Pollexfen*, with Justices *Powell*, *Rokesby* and *Ventris*, adjudged that the tenant in this case was bound to repair all the five messuages, and to leave them in repair; for though in the first covenant he is obliged only to repair the messuages so agreed to be erected, which were three, during the term, yet, by the last covenant he is bound *dicta dimissa ac domos superinde erect'* (not agreed to be erected, but *superinde erect'* indefinitely) which extends to all the houses which should hereafter be erected on the premises before the term expired, whether they were agreed before to be erected or not. Also this last covenant is to leave them in repair at the end of the term. And they held, if a man took a lease of a messuage and land, and covenanted to leave the demised premises in good repair at the end of the term, and he erects another messuage on part of the land, besides that which was there before, he is bound to keep and to leave the messuage so newly-erected by himself in repair as well as the other; and cited the case of *Darcy v. Askwith*, from *Hobart's Reports*. And also, in this case, as the plaintiff said that he was possessed by virtue of the will for the term of a thousand years, and the devise is to him for his life only, the remainder to his son and the heirs male of his body, the Court held it well; for the remainder to his son is only a contingent, supposing any remainder of a term can be; for every estate for life is in supposal of law of greater continuance than any estate for years, and therefore the whole term was in the father during his life, and the remainder to the son was but a possibility; and therefore *judgment was given for the plaintiff* (a).

It should also be borne in mind by the architect, on which-  
ever side he be employed, whether that of the landlord or of

A tenant having a right to remove any

(a) This case agrees in most points with that of *The City of London v. Nash*, quoted in page 94.

## CIVIL DILAPIDATIONS.

... that whatever buildings, chattels or fixtures which the tenant has a legal right to remove, as having been erected and added to his landlord's freehold without legal annexation, such removal must be *within the term*, otherwise he will be deemed a trespasser (*a*), although Lord *Kenyon* (*b*) acknowledged the inclination of his mind in such a case to be, that he had a right to come on the premises, for the purpose of taking them away: but as to that point, it was not decided, as the defendant in the principal case had let judgment go by default.

### Authorities.

Lord *Hardwicke*.

A mortgage of a brew-house with the appurtenances, will not carry the utensils, but the things only belonging to out-houses.

The law in this case is elucidated in the case of *Ex parte Quincy* (*c*), argued before Lord Chancellor *Hardwicke* on the 15th August, 1750, wherein it appeared, that in 1745 one *Robinson* sold the utensils of a brew-house, and let a lease of the same to one *Brerewood*, and in 1746 mortgaged his brew-house with the appurtenances &c. to *J. S.* After this transaction *Brerewood* sold his lease and utensils to *Warner*, who for a sum of money in 1748, mortgaged the whole to *Robinson*, who afterwards became a bankrupt, and his effects became vested in the petitioner *Quincy*, as assignee under the commission, who, as standing in the place of the bankrupt, was entitled to the mortgage from *Warner*, and by virtue thereof claimed the utensils.

*J. S.* the mortgagee of the brew-house in 1746, insisted that the fixtures passed by his mortgage; and therefore this petition was preferred for a delivery of all the utensils.

The Attorney-General appeared for the mortgagee, and cited *Owen's Reports* in the King's Bench and Common Pleas in the reign of Queen Elizabeth, folio 71, under the title *Heir and Ancestor*.

The Lord Chancellor said, "this is a case for a mere action at law, and might be determined by action of trover or detinue;

(a) Woodf. Land. and Ten. chap. ix.  
§ I. p. 218.

(b) Esp. Rep. vol. iv. p. 35.

(c) Atk. Rep. vol. i. p. 477.

and he was inclined to think that it was not the intent of *Robinson* to mortgage the utensils, for there are in general some description of things in a brew-house. The manner of describing the parcels showed that he did not at all mean to mortgage utensils, for the word *appurtenances* seemed to intend only, things belonging to out-houses. The rule as to fixtures, continued his Lordship, as between an heir and an executor is another thing. The freehold descending on the heir, the executor cannot enter to take away fixtures without being a trespasser. But there is another rule between landlord and tenant: during the term a tenant may take away chimney-pieces, and even wainscot, which is a very strong case, but not after the term, if he does, he is a trespasser. A mortgage, says Mr. Attorney-General, is a purchase, but then it is a redeemable one. How does it stand between a purchaser and a vendor? If a man sells a house where there is a copper, or a brew-house where there are utensils, *unless there was some consideration given for them, and a valuation set upon them, they would not pass.* But then another question will arise after possession is delivered, what action you can bring? For where things are fixed to the freehold, an action of trover will not lie for them. Several sorts of things are often fixed to the freehold, and yet may be taken away; as beds fastened to the ceiling with ropes, nay, frequently nailed, and yet no doubt but they may be removed."

An executor cannot enter to take away fixtures without being a trespasser.

A tenant during the term may take chimney-pieces, and even wainscot, but if after, he is a trespasser.

By the sale of a brew-house the utensils will not pass.

Beds fastened to the ceilings with ropes, or even nailed, are not fixtures, but may be removed.

"The difficulty with me is the possession of the mortgagor, but that is cleared up, because it was the express agreement between the parties, that the mortgagor should not be prevented from coming on the brew-house. I apprehend the sale of the utensils was a defeasible sale, to revert to the bankrupt at the end of the term, and if so, there is an equity in the grantor, and therefore as to the mortgagee, a possession in the bankrupt."

Another case of a similar nature, may be cited to the purpose, which is *Poole's case* (a), entitled by Mr. Serjeant

(a) Salk.-Rep. vol. i. p. 368.

Things set up by lessee for years, for the convenience of trade, are removable during the term.

*Salkeld*, "incident, appendant and appurtenant" wherein Chief Justice *Holt* held, that things set up by a lessee for years, for the convenience of trade, are removable during the term, and not only so, but are likewise seizable on a *feri facias*. It was tried at Nisi Prius in Middlesex, Michaelmas Term, 2 Ann. before Chief Justice *Holt*.

In this case, which is also worthy of the architect's attention, the tenant for years made an under-lease of a house in Holborn, to one *J. S.*, who was by trade a soap-boiler. This *J. S.* for the convenience of his trade, put up *vats, coppers, tables, partitions*, and *paved the back yard &c.* And now upon a *feri facias* against *J. S.*, which issued on a judgment in debt. The sheriff took all these things, and left the house stripped and in a ruinous condition; so that the first lessee was liable to make good the waste and dilapidations, and thereupon brought a special action on the case against the sheriff, and those that bought the goods for the damage done to the house.

First point,

by virtue of the common law.

The Chief Justice *Holt* held (*a*), 1st. That during the term, the soap-boiler might well remove the vats that he had set up in relation to trade, and *that he might do it by the common law*, (and not by virtue of any special custom,) in favour of trade and to encourage industry. But after the term they became a gift in law to him in reversion, and are not removable.

Second point.

2dly. That (*b*) there was a difference between what the soap-boiler did to carry on his trade, and what he did to complete the house, as hearths and chimney-pieces, which he held were not removable.

Third point.

3dly. That the sheriff might take them in execution, as well as the under-lessee might remove them, and therefore this was not like tenant for years without impeachment of waste.

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(*a*) Co. 1st Inst. 53 a. Roll. Rep. (b) Co. 4th Inst. page 63, 64, Her-  
vol. i. p. 216. Swinburne on Wills, *lakenden's case*. Owen's Reports,  
pp. 132. 345. and 346. Moor, 177, 8. p. 70, 71.

In that his Lordship allowed that the sheriff could not cut down and sell, though the tenant might; and the reason was, because in that case the tenant has only a bare *power* without an *interest*; but in this case the under-lessee *has an interest* as well as a power, in the same way that a tenant for years has in standing corn, in which case the sheriff can cut down and sell.

Barns or sheds, or other buildings erected for the express purpose of trade or manufacture, on loose stone piers, patents or blocks of timber, may be removed (a). Even in a case where the lease contained a covenant, that the lessee should leave all the buildings, which then were or should be erected on the premises during the term, in repair &c. and the breach of covenant assigned was, that the defendant took down and carried away two sheds that had been erected by the lessee during the term. The defendant pleaded performance of the covenants, and the issue was taken on the breach as above assigned. The buildings in question were two sheds, called *Dutch barns*, and which had been erected by the defendant during his term, and which his counsel contended he had a right to remove. Lord *Kenyon*, before whom the cause was tried, said, "If a tenant will build upon premises devised to him a substantial addition to the house, or add to its magnificence, he must leave his additions, at the expiration of the term, for the benefit of his landlord: but the law will make the most favourable construction for the tenant, where he had made necessary and useful erections for the benefit of his trade or manufacture, and which enable him to carry it on with more advantage. It has been held so in the case of cyder mills and in other cases; and I shall not narrow the law, but hold erections of this sort, made for the benefit of trade, or constructed as the present, to be removable at the end of the term."

What buildings may be taken away by a tenant.

Lord *Kenyon's* judgment thereon.

It was then contended, that by the express words of the covenant, the tenant was to leave all erections on the premises

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(a) Bull. N. P. p. 34.



at the end of the term. To which his Lordship replied, "I am aware of the full extent of that, and am not quite sure that it concludes the question. It means, that the tenant should leave all those buildings which are annexed to and become part of the reversionary estate (a).

Temporary  
and estate  
buildings.

In surveying dilapidations, waste or want of repairs, the architect should be particular in making himself acquainted with the nature of the buildings on the property; that is, which belong to the estate, which to the reversionist, if any, and which are temporary, or such as may be removed by the tenant. The following observations and cases will, I trust, be found of service in this most important part of our professional duties:—

Estate build-  
ings.

If buildings are let into the soil or be otherwise fixed permanently to the freehold, they are *estate buildings*, must be kept in repair as such, must be left at the expiration of the lease, and be kept as free from dilapidations and waste as the rest of the buildings. The distinction between *estate* and *temporary* buildings, that the former may not be removed, as being the property of the landlord by whomsoever they may have been built; and that the latter, either from the nature of their construction, or of their application, may be removed, as the law looks upon them in the nature of *chattels*, *plant* or tenant's fixtures.

Cases in ex-  
emplification,

The following case exemplifies this reasoning in a clear manner, and decides that where a tenant covenants to yield up in repair at the expiration of his lease, all buildings which should be erected during the term upon the demised premises, it includes *all buildings erected and used by him for the purpose of trade and manufacture, if such buildings be let into the soil, or otherwise fixed to the freehold, but not where they rest merely upon blocks or pattens.*

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(a) Esp. Rep. vol. iii. p. 11.

This case, *Naylor and another*, executors of *Samuel Naylor*, against *Collinge*, was argued on the 19th of November, 1807, and is exceedingly well worthy of the architect's attention on this important part of his practice.

*Naylor and  
another  
v.  
Collinge.*

The leading facts, as gathered from Mr. *Taunton's* learned Reports (a), are, that a rule *nisi* had been obtained in the preceding Trinity Term for an attachment against the defendant, for the non-performance of the conditions of an award. The plaintiffs, as executors of the lessor, had brought an action against the defendant for a breach of covenant, committed by him *in not keeping and delivering up at the expiration of his lease, in a proper state of repair, certain premises of which he was tenant*. Upon the trial of the cause an order was made to refer all matters in difference between the parties to arbitration.

It appeared that the defendant, as *lessee*, had covenanted with the plaintiff, that he should and would from time to time, and at all times during the continuance of the said lease, at his own proper costs and charges, well and sufficiently repair, uphold and support, maintain, amend and keep the said messuage or tenement and premises, and all erections and buildings, then already erected and built, as also *all other erections and buildings that might thereafter be erected and built, in or upon the said premises, or any part thereof, in, by and with, all and all manner of needful and necessary reparations and amendments whatsoever, when, where and as often as need or occasion should be or require, and the said premises in such good and sufficient repair, should and would at the end or sooner determination of the said lease, peaceably and quietly surrender and yield up &c. as is usual.*

The arbitrator, to whom the case was referred, awarded amongst other things, that the defendant should pay to the plaintiff the sum of 90*l.*, for and on account of the breach of the said covenant, *so far as the same respects the repairing*

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(a) Vol. I. p. 19.

*and yielding up in repair certain erections and buildings, which during the term granted by the said lease, were erected and built on the said demised premises by the said John Collinge, by whom the said were built; and the farther sum of 60*l.* for and on account of the breach of the said covenant, so far as the same respects the repairing and yielding up in repair certain other erections and buildings, which during the term granted by the said lease, were erected and built on the said demised premises, by the said John Collinge, as tenant and occupier thereof, for the purpose of trade and manufacture only, but which were not let into the ground, soil or freehold of the said premises, but were built and supported on blocks or pattens of wood laid upon the ground, and were, in like manner, removed and carried away by the said John Collinge, by whom the said were built.*

Neither of these sums had been paid by the defendant, and the award was drawn in the before-mentioned form, separating the amounts or value of the buildings that had been let into the ground and removed, from those that were only built on blocks on pattens of wood, for the purpose of giving the parties an opportunity of obtaining the judgment of the Court upon the question, *whether the different kind of buildings which it described, or either of them, were comprehended in the terms of the covenant?*

The judgment of the Court of Common Pleas sought as to this question.

Argument.

Serjeant *Skephard*, and the present Judge (then Serjeant) *Bayley*, in shewing cause for the defendant, observed that there were *two* questions submitted on this award to the decision of the Court. Namely, whether the defendant was entitled to resume, *first*, those buildings which, during the term, were erected by himself for the purposes of trade, and were let into the soil? And, *secondly*, those which were erected by him for the same purpose, and were not let into the soil, but rested on blocks or pattens of wood. It had been long since determined, argued the learned Serjants, *that the tenant was entitled to remove such buildings as he had erected during his term for the purposes of trade; and it was not the intention of the parties in the present instance to restrain the operation*

Two questions.

The general rule in such cases.

of this general rule. The object of the covenant was merely to provide that those buildings, which the defendant was bound by law to leave on the premises, should be left in a proper state of repair.

The Court interposed, and observed, "that the parties were precluded from all *general* argument by the *express* words of the covenant. The question," continued the learned Chief Justice of the Common Pleas, "must be confined to the construction of this argument." What then is its plain and obvious import? The words are, "*all erections and buildings.*" The defendant therefore in order to succeed in this part of his case, must prove *that erections and buildings raised for the purposes of trade, are in fact not erections and buildings at all.* If the tenant meant to have excluded such buildings of this nature, it should have been so expressed in the lease. The Court cannot go out of the covenant. The other point the Court declared to be as clear in favour of the defendant as the other was for the plaintiff. *The thing removed is described as not let into the soil, but as resting upon blocks or pattens. It is therefore a mere chattel, and is not an erection and building within the meaning of the covenant.*

Judgment of the Court.

Mr. Serjeant (now Chief Justice) Best, who was to have argued on the other side, deferred to the opinion of the Court upon the latter point; and it was ordered by the Court, that upon payment of the first sum of 90*l.* the rule should be discharged.

Judgment.

Lord Ellenborough, the late learned Chief Justice of the King's Bench, decided similar points in a similar manner, with great elaborateness and perspicuity, in the often quoted case of *Elwes v. Maw (a)*, which cannot be too attentively perused by the architect; as it defines, with singular precision, the difference between *estate buildings* erected by a tenant, which he may not remove, and is consequently obliged to keep in repair, and *temporary buildings*, which he may remove.

Lord Ellenborough's opinion on the same point.

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(a) East's Rep. vol. i. p. 38.

The case of  
*Elwes v. Maw.*

This case was heard in Michaelmas Term (Saturday, Nov. 13th) 1802, and is as follows:—

That a tenant in agriculture, who had erected at his own expense, and for the mere necessary and convenient occupation of his farm, a beast-house, carpenter's shop, fuel-house, cart-house, pump-house, and fold-yard wall, *which buildings were of brick and mortar, and tiled, and let into the ground, could not remove the same; though during his term, and though he thereby left the premises in the same state as when he entered.* There appeared to be a distinction between *annexations to the freehold of that nature*, for the purposes of trade, and those made for the purposes of agriculture and better enjoying the immediate profits of the land, in favour of the tenant's right, to remove the former; that is, where the superincumbent building is erected as a mere accessory to a personal chattel, as an engine; but where it is accessory to the realty, it could in no case be removed.

Declaration or  
statement of  
the case.

The declaration stated that the plaintiff was seized in fee of a certain messuage, with the out-houses &c. and certain land &c. in the parish of Bigby, in the county of Lincoln, which premises were in the tenure and occupation of the defendant, as tenant thereof to the plaintiff, at a certain yearly rent, the reversion belonging to the plaintiff; and that the defendant wrongfully, and injuriously, and without the licence and against the will of the plaintiff, pulled down divers buildings, parcel of the said premises, in his, the defendant's, tenure and occupation, viz. a beast-house, a carpenter's shop, a waggon-house, a fuel-house, and a pigeon-house, and a brick-wall, inclosing the fold-yard, and took and carried away the materials, which were the property of the plaintiff, as landlord, and converted them to his, the defendant's, own use; by reason whereof the reversionary estate of the plaintiff in the premises, was greatly injured &c. The defendant pleaded the General Issue. And at the trial at the last Lincoln Assizes, a verdict was found for the plaintiff, with 60*l.* damages, subject to the opinion of the Court on the following case:—

Case

The defendant occupied a farm, consisting of a messuage, cottages, barn, stables, and out-houses and lands, at Bigby,

in the county of Lincoln, under a lease from the plaintiff, for twenty-one years, commencing on the 12th day of May, 1779; which lease contained a covenant on the part of the tenant, to keep and deliver up in repair the said *messuage, barn, stables, and out-houses*, and other buildings belonging to the said *demised premises*. About fifteen years before the expiration of the lease, the defendant erected upon the said farm at his own expense a substantial *beast-house, a carpenter's shop, a fuel-house, a cart-house, and pump-house, and fold-yard wall, the buildings were of brick and mortar, and tiled, and the foundation of them were about one foot and a-half deep in the ground. The carpenter's shop was closed in, and the other buildings were open to the tenant, and supported by brick pillars. The fold-yard wall was of brick and mortar, and its foundation was in the ground.* The defendant, previous to the expiration of his lease, pulled down the erections, dug up the foundations, and carried away the materials, leaving the premises in the same state as when he entered upon them. These erections *were necessary and convenient for the occupation of the farm*, which could not be well managed without them. The question for the opinion of the Court was, *whether the defendant had a right to take away these erections? If he had, then a verdict to be entered for the defendant; if not, the verdict for the plaintiff to stand.*

Question for the Court,

This case was first argued in Easter Term last, by *Torkington* for the plaintiff, and *Clarke* for the defendant, and again in this Term, by *Vaughan*, Serjt. for the plaintiff, and *Balguy* for the defendant.

It was argued for the plaintiff, that the removal of the building in question was waste at the common law, and that this case did not fall within any of the exceptions which had been introduced *solely for the benefit of trade* in relaxation of the old rule. That rule was, *that whatever was once annexed to the freehold, could never be severed again without the consent of the owner of the inheritance.* Accordingly, glass windows, wainscot, benches, doors, furnaces &c. though annexed by tenant for years for his own accommodation, could not be

Plaintiff's case.

The ancient rule in such cases.

Decided in  
the reign of  
Edw. 2.

Judgment of  
the Court of  
Common Pleas  
thereon.

Rule between  
landlord and  
tenant as to  
dilapidations,  
exemplified in  
this case.

removed by him (a). The principle on which this was founded was; the injury that would thereby arise to the inheritance from disfiguring the walls of the mansion; though some of these things were in their nature personal chattels, that supplied the place of mere moveable utensils and furniture. *But it never was questioned but that buildings let into the soil became part of the freehold from the very nature of the thing.* This important rule was decided so long ago as in Hilary Term of the 17th Edw. 2. 518, in a writ of waste against a lessee who had built a house and pulled it down during his term; and Lord Coke in his *First Institute* (b), in a passage to the same purpose, goes further, and says, "That even the building of such new house by the tenant, is waste."... But this is denied in the case of *Lord D'Arcy v. Askwith*, as reported by Sir Henry Hobart (c), though it agrees that the letting down of such new house built by the tenant himself, would be waste. So by the 10 Hen. 7. 2. pl. 3, the taking down a stone wall or a partition between two chambers, is waste. It does not indeed appear by that book, whether those erections had been before made by the tenant himself. But they were so held by Judge Meade in the case of *Cooke v. Humphry* (d). All these opinions are further confirmed by Lord Coke, at the end of *Herlakenden's case* (e), where it is said to have been adjudged in the Court of Common Pleas, that *glass fastened to the windows, or wainscot to the house by the lessee, cannot be removed by him*: and that it makes no difference in law whether the fastening of the latter be by great or little nails, screws or irons put through the posts or walls (as had then been of late invented), or in whatever other manner it was fastened to the posts or walls of the house.

In all these cases, the rule as between landlord and tenant seems to have followed that between heir and executor, founded on the before-mentioned reason; and no innovation upon the

(a) Co. 1st Inst. 55 a.

(b) Ibid.

(c) Hobart's Rep. p. 234.

(d) Moore's Rep. p. 177.

(e) Co. Rep. vol. iv. p. 63-64.

strict rule seems ever to have been admitted, except in the case before the Lord Chief Baron *Comyns* (a) at Nisi Prius, of the cyder-mill, which he held should go to the executor, and not to the heir; but on what particular grounds does not appear; and in the case of *Culling v. Tufnal* (b), before Lord Chief Justice *Treby*, at Hereford, in 1694, wherein a barn erected by a tenant upon pattens and blocks of timber, lying on, but not let into the ground, was held to be removable by the tenant. But even here he relied on the custom of the country, in favour of the tenant, with reference to which it might be presumed that he and his landlord had contracted. The only established exception (which the plaintiff's counsel admitted, was as old as the rule itself) is in the favour of trade, with respect to articles annexed to the freehold for the purpose of carrying on trade and manufactures. In the 20th Hen. 7 (c), an heir brought an action of trespass against the executors of his ancestor, for taking away a furnace fixed to the freehold with mortar, and the taking was held to be tortious. But it was said in that case, "that if a lessee for years set up such a furnace for his own advantage, or a dyer his vats and vessels to carry on his business (d), he may remove them during his term; but if he suffer them to remain fixed to the land after the end of the term, then they belong to the lessor." And so in a similar manner the oven &c. of a baker.

Exception to the rule in favour of trade.

Case of an heir against the executors of his predecessor.

The same case then continues, "It is no waste to remove such things by any." But this is said to have been against the opinions before mentioned, and to have been doubted in the 42d Edw. 3 (e), whether such proceedings were waste or not. It is therefore clear from the whole of these passages, that the only generally admitted exception, was in favour of traders, which is shewn by the before quoted examples of the dyer and

(a) Cited by Lord *Hardwicke*, in the before mentioned case of *Lawton v. Lawton*, in which he said, "It was held by Lord Chief Baron *Comyns*, a very able common lawyer, that cyder-mills were personal estate, and that

it should go to the executor."

(b) Bul. N. P. p. 54.

(c) Fo. 13. pl. 24.

(d) The words in the original are, "pur occupier son occupation."

(e) Fo. 6. pl. 19.



baker affixing vessels *pur occupier son occupations*; and that at least it was doubtful whether the same privilege extended to other traders, affixing to the freehold similar articles for the purpose of carrying on their businesses. And the exception, said the learned counsel, is the more remarkable, because at that early period of our history, agriculture must have been of much greater importance to the state than trade.

Distinction  
between trade  
and agricul-  
tural build-  
ings.

This distinction was continued in latter times, as appears by *Poole's case* (a), tried in Michaelmas Term, 2d Anne, in an action on the case by a lessee against the sheriff of Middlesex, who had taken in execution the *vats, coppers, tables, partitions, pavement &c.* of an under-lessee, who was a soap-boiler, which he had put up as fixtures for the use and convenience of his trade; wherein Lord Chief Justice *Holt* held, that during his term the soap-boiler, might remove the *vats* set up in relation to trade, by the common law. But he held there was a difference between what a tenant did to carry on his trade, and what he did to complete the building of the house; such as hearths and chimney-pieces, which he held were not removable.

The next case to the same effect, was that of *Cave v. Cave* (b), in 1705, where the Lord Keeper held, that *not only wainscot, but also pictures and glasses put up in the place of wainscot, should go to the heir and not to the executor, to prevent the house from being disfigured.*

The learned Serjeant then mentioned the before quoted (c) case of *Lawton v. Lawton* (d), where the Lord Chancellor *Hardwicke* decreed that a fire-engine erected by the tenant for life for the benefit of a colliery, should be considered as personal estate, and go to his executor, and not to the remainder-man, in favour of creditors.

Custom some-  
times of avail  
in such cases.

But, in that case it was proved to be *customary* to remove such an engine; that in building the shed, for its security,

(a) Salk. vol. i. p. 368.

(c) Ante, p. 117.

(b) Vern. Ch. Rep. vol. iii. p. 508.

(d) Atk. Ch. Rep. vol. iii. p. 12.

holes were left for the ends of the timber, to make it more commodious for removal, and that it was very capable of being removed. The evidence relied on by the other side, was, that it could not be removed without tearing up the soil and destroying the brick-work. But Lord Hardwicke considered the brick-work in that case as a mere accessory to the engine, which in its own nature was a mere personal movable chattel. One reason, he said, which weighed with him was, that it was a mixed case, between enjoying the profits of the land, and carrying on a species of trade; and considering it in that light, it came near the instances of furnaces and coppers in brew-houses.

That case (*Lawton v. Lawton*) was decided by Lord Hardwicke in 1743; but in that of *Ex parte Quincy*, in 1750 (a), also before quoted (b), where the principal question was, whether the utensils of a brew-house passed by mortgage of the brew-house, with the appurtenances, it was said, that a tenant might during the term, take away chimney-pieces, and even wainscot; but the latter is there observed to be a very strong case. The same observation was also made in the before mentioned case of *Lawton v. Lawton*, with this difference, that it was there said of wainscot fixed only by screws, and of marble chimney-pieces. This opinion, the learned counsel considered, might have proceeded as it did in *Beck v. Rebow* (c), upon the consideration that matters of this sort were merely ornamental furniture, and not necessary to the enjoyment of the freehold.

In what cases a tenant may take away chimney-pieces &c.

He also cited the case of *Lord Dudley v. Lord Ward* (d), decided in 1750, which was like that of *Lawton v. Lawton*, and on the authority of which he said it had been decided. In that case Lord Hardwicke recognized the general rule, with the single exception, as between landlord and tenant, that fixtures annexed by the latter for the sake of trade, may be

Lord Dudley  
v.  
Lord Ward.

(a) Atk. Ch. Rep. vol. i. p. 477.

(d) Amb. Ch. Rep. p. 113; and Bul.

(b) Ante, p. 130.

N. P. p. 34.

(c) P. Wms. Ch. Rep. vol. i. p. 94.

removed. There too; the fire-engine was considered as the principal, and the building erected over it, as the necessary; while the colliery itself was regarded as in part the carrying on of a trade.

*Lawton*  
v.  
*Salmon.*

In the case of *Lawton v. Salmon*, decided in Easter Term of the 22d Geo. 3, by the Court of King's Bench, and cited in a note to that of *Fisherbert v. Shaw* (a), which turned on a particular agreement, *soli-pass* were held to go to the heir and not to the executor. And though Lord Mansfield said that the rule had been relaxed as between landlord and tenant and tenant for life and remainder-man, in respect of things put up by the tenant in possession; still he confined the relaxation to things only so affixed for the benefit of trade. Lord Mansfield there alluded to the case of the cyder-mill (doubtfully said the learned Serjeant) as standing alone and not printed at large. Then the case of *Dean v. Allardyce* (b), decided at the Sittings after Easter Term, 38th Geo. 3, was a case where two sheds called *Dutch barns*, which had been erected by the tenant during his term, were removed by him, and being sued on his covenant, by which he undertook to leave all buildings which were then, or that should be erected on the premises during the term, in repair; Lord Kenyon Nisi Prius, held, that buildings of that description were included; and that the law would make the most favourable construction for the tenant, where he had made necessary and useful erections for the benefit of his trade or manufacture.

The law will make the most favourable construction for tenants who build for trade or manufacture.

Of what precise description the buildings in this case were, does not appear; possibly, said the learned Serjeant, they were not affixed to the ground (c); at least not such as were removed. If not, said he, the case amounts to no more than that of *Penton v. Robart* (d), in which a *carriage house* of wood, which had been erected on a brick foundation by the tenant, for the purpose of carrying on his trade, was

(a) H. Blackst. Rep. vol. i. p. 259.

(b) Esp. N. P. vol. iii. Case 11.

(c) In Mr. Balguy's argument for the

defendant, it will be seen what description of buildings they were, &c.

(d) East's Rep. vol. ii. p. 68.

removed by him. But it did not appear there, that the foundation had been removed, but only *the superstructure of wood; which had been brought by the tenant from another place, where he had before carried on his business.*

Lord Kenyon in that case, indeed, laid great stress on the instances of gardeners and nurserymen in the neighbourhood of the metropolis erecting green-houses &c. which he considered they would be at liberty to remove. Whether that be done under particular agreements, or not, did not appear; but supposing the law would imply an exception in favour of tenants of that description, it would only be upon the ground of considering them as carrying on a species of trade; the very nature of their occupation, and of the letting being to enable them to disannex even trees from the land.

Lord Kenyon's opinion on green-houses and similar erections.

On the first argument of this very important case, Mr. Justice Lawrence intimated, *that if ground were let expressly for nursery ground, it might be considered as implied in the terms of the contract, that it was to be used for taking up young trees &c. as is usual in such cases.* But he expressed a wish to be informed of the usual terms of the leases under which such grounds were held in the neighbourhood of the metropolis.

When trees may be disannexed from the land.

But none of the cases, continued the learned counsel for the plaintiff, have gone the length then contended for; and argued that the very grounds on which exceptions have been made from the general rule, preclude the present case. Erections of this sort, he said, are not in their nature temporary nor moveable, but are calculated solely for the enjoyment of the land. The expense of erecting is great, and their value is great on the spot, but of trifling consideration when removed: the injury of their removal therefore, he argued, was much greater to the landlord, than the benefit of the materials when removed, are to the tenant.

If the *exception*, therefore, were extended to buildings erected for the purpose of agriculture, it would be as extensive

Land is the principal, and buildings the accessory thereto.

as the *rule* itself, and would therefore destroy it. The sole object, he observed, of such erections, is for the purpose of enjoying the produce of the land. The *land* therefore is the *principal*, and the *buildings* the *accessory* to the *land*. This distinguishes it essentially from buildings erected for engines or machinery used in trade, where the *personal chattel* is the *principal*. No other line than this can be drawn without overthrowing all the authorities.

Argument for the defendant.

On the part of the defendant Mr. *Balguay* contended that the old rule of law, had been gradually relaxed between *landlord* and *tenant*, though not so much between *tenant for life* and *remainder-man*, or between *heir* and *executor*. The object has been to encourage tenants to expend their money in the improvement of the premises, and in making their industry as productive as possible, which is for the benefit of the state as well as of the individuals, and applies at least as strongly to tenants in husbandry as in trade.

Agricultural buildings to be considered on an equality with trade buildings.

Agriculture, he argued, in the improved state in which it is now carried on, is in itself a trade. It requires a much larger capital than formerly, and the use of more expensive implements and machinery. Without the aid of modern improvements, the land cannot be made so productive as it otherwise may be, nor the produce so well preserved and brought to market. But unless the tenant is entitled to take away with him at the expiration of his term, or have a compensation in value for buildings like these in question erected in such manner as to be capable of being removed at pleasure and rebuilt or set up anew on any other farm, he will not be at the expense of erecting them at all. And therefore though he, the tenant, and through him the public, would thereby suffer, yet the landlord would not be the better for the right which he now claims.

Consequences of not being permitted to remove them.

This, argued the learned counsel, is no question whether permanent additions or improvements made by a tenant to the old dwelling-house or out-buildings, or even new buildings of that sort erected by him for his personal accommodation, are to be

removed at the end of the term. For not even persons renting premises for the purpose of carrying on trades, he contended, had any such privilege: but whether buildings so erected for the sole purpose of carrying on the farm, that is, of turning to the best account the capital and industry of the farmer in his trade or business may not be removed by him. The materials, he said, of which the buildings were composed, could not vary the law, but only the objects and interests of the persons concerned.

And he, in the before-mentioned case of *Dean v. Aldridge* (a) the tenant was entitled to remove the buildings called Dutch barns, the same rule would also apply to the buildings in question, which are as much calculated for removal. For in that case (as appears from the manuscript note of one of the counsel in the cause) the sheds erected "had a foundation of brick in the ground, and uprights fixed in and rising from the brick-work, and supporting the roof, which was composed of tiles and the sides open," as in the present case. If, said Mr. Holgate, the exception be confined to erections for the benefit of trade, Lord Kenyon in that case considered the Dutch barns, as coming within that description. Which is consistent to the opinion delivered by the same learned Judge in the case of *Penton v. Robart* (b). It is true, that was the case of a varnish house; but it is clear that his Lordship's opinion was founded on the extension of the exception in the case of landlord and tenant generally; for in the instances put by him in illustration of his opinion are cases of gardeners and nurserymen whose profits are derived out of the immediate produce of the land; and the buildings then in question, he contended, were no more annexed to the soil than the varnish house was in the other case; which was built on a foundation of brick, and than the hot-houses and green-houses of the persons alluded to.

Right of taking away buildings called Dutch barns.

What sort of buildings they were.

But the argument, he said, did not rest alone on very modern cases, but was strongly supported by the decisions of

(a) Esp. N. P. Rep. vol. iii. Case 11, & M. S. (b) East Rep. vol. li. p. 88.

Lord *Hardwicke* in the cases of *Lawton v. Lawton* (a), and *Lord Dudley v. Lord Ward* (b). In those cases, even as between tenants for life or in tail and the remainder-men, the executors of the former were held to be entitled to the fire-engines (steam-engines) of collieries; *buildings which in their very nature, must be annexed to the soil*, and without which the profits of the lands, namely, the coal, could not be taken. Those were indeed said to be *mixed* cases between taking the profit of land and carrying on a trade, but wherefore *mixed*, he said, did not, to him, so plainly appear. So, he contended, the case of the cyder-mill, was directly in point, that utensil or machine, was as essential to the enjoyment of the land in that particular species of produce out of which the cyder was to be made, as barns and other buildings are to the enjoyment of arable, or beast-houses of pasture land. That case, he observed, was much stronger than that, then contended for; the question arising there between the heir and executor, where, it may be admitted that the old rule has prevailed more strictly. All the cases, therefore, he said, in the books between persons standing in that relation, might well be laid out of the question, as they turned upon the presumed intention of the ancestor, or testator, in favour of the heir, that the inheritance should descend to him entire and undefaced.

Case of a barn removed by a tenant.

But the case, he argued, of *Culling v. Tufnal* (c), which was in point, was between landlord and tenant. It was the case of a *barn* that had been removed by a tenant: and though the foundations were not dug into the ground, yet its very weight must have sunk it in some measure below the surface of the soil. It was true, he acknowledged, that the case had been put by him on the ground of the custom of the country; but Mr. Justice *Buller*, in citing it, observed, that even *now, without any custom*, it would be determined in favour of the tenant, without any difficulty; for that the old rule had been relaxed as between landlord and tenant &c. though still preserved as between heir and executor. No distinction is there

Judge *Buller's* opinion.

(a) Atk. Ch. Rep. vol. iii. p. 13.

(b) Amb. Rep. p. 113.

(c) Bull. N. P. p. 34.

hinted at between trade and agriculture. It is true, he said, that in the case of *Fitzherbert v. Shaw* (a) the question at last turned on the agreement, but Mr. Justice Gould was decidedly of opinion at the trial, that if the tenant had removed the buildings during the term, he would have been justified in so doing; and in that case some of the things removed were, a shed built on brick-work, and some posts and rails erected by the tenant, all of which must have been let into the ground, and were adapted to purposes of agriculture.

Judge Gould's opinion.

Upon the whole, they contended, that the only line to be drawn from all the books was, that whatever buildings were erected by a tenant, be the materials what they may, or how long placed in or upon the ground, for the immediate purposes of his trade, or, for the more advantageous taking or improving the profits of his trade, or, for the more advantageous taking or improving the profits of his farm, he may remove them again, provided he leave the premises on his quitting as he found them. According to this rule, no injury could ensue to the landlord, whose property would, on the contrary, be eventually benefitted by the better cultivation of it, while the public would derive an immediate advantage from the encouragement afforded to the capital and industry of the tenant.

Summary.

Cur. adv. vult.

Before quoting the opinion of the Court of King's Bench on this important question, as delivered by the late Lord Ellenborough, I cannot too much impress on such of my readers, as are of my profession, the necessity of an attentive perusal of it, as a guide to them in surveys of such a nature.

The Chief Justice, Lord ELLENBOROUGH, now delivered the opinion of the Court. This was an action upon the case in the nature of waste by a landlord, the reversioner in fee, against his late tenant who had held under a term for twenty-one years a farm consisting of a messuage, and lands, out-houses and barns &c. thereto belonging, and who, as the case

Elwes  
v.  
Mawe.

Lord Ellenborough's opinion on this case.

(a) H. Blackst. Rep. vol. 1. p. 259.



reserved stated, during the term, and about fifteen years before its expiration, erected at his own expense a *beast-house*, *carpenter's shop*, a *fuel-house*, a *cart-house*, a *pump-house*, and fold yard. The buildings were of brick and mortar, and tiled, and the foundations of them were about a foot and a half deep in the ground. The *carpenter's shop* was closed in, and the other buildings were open to the front, and supported by brick pillars. The fold yard wall was of brick and mortar, and its foundation was in the ground. The defendant previous to the expiration of his lease, pulled down the erections, dug up the foundations, and carried away the materials; leaving the premises in the same state as when he entered upon them. The case further stated, that these erections were necessary and convenient for the occupation of the farm, which could not be well managed without them. And the question for the opinion of the Court was, *Whether the defendant had a right to take away these erections?* Upon a full consideration of all the cases cited upon this and the former argument, which are indeed nearly all that the books afford materially relative to the subject, we are all of opinion that the defendant has not a right to take away these erections.

Description of the buildings,

and manner of erection.

Question for the opinion of the Court.

Whose unanimous opinion was that the tenant had no right to remove such buildings.

Reasons for such opinions.

As to fixtures.

Questions respecting the right to what are ordinarily called fixtures, principally arise between three classes of persons, 1st, Between different descriptions of representatives of the same owner of the inheritance; viz. between his *heir* and *executor*. In this first case, i. e. as between heir and executor, the rule prevails with the most rigour in favour of the inheritance, and against the right to disannex therefrom, and to consider as a personal chattel, any thing which has been affixed thereto. 2dly, Between the *executors of tenant for life or in tail*, and the *remainder-man or reversioner*; in which case the right to fixtures is considered more favourably for executors than in the preceding case between heir and executor. The 3d case, and that in which the greatest latitude and indulgence has always been allowed in favour of the claim to having any particular articles considered as personal chattels as against the claim in respect of freehold or inheritance is the case between landlord and tenant.

But the *general rule* on this subject is that which obtains in the first-mentioned case, *i.e.* between heir and executor; and that rule (as found in the Year Book, 17 E. 2. p. 518, and laid down at the close of *Herlakenden's case* (a), in *Cooke v. Humphrey* (b), and in *Lord Darby v. Asquith* (c),) in the part cited by my brother *Vaughan*, and in other cases, is that where a lessee, having annexed any thing to the freehold during his term, afterwards takes it away, it is waste. But this rule, at a very early period, had several exceptions attempted to be ingrafted upon it in favour of trade, and of those vessels and utensils which are immediately subservient to the purposes of trade. In the Year Book, 42 E. 3. 6, the right of the tenant to remove a furnace, erected by him during his term, is doubted and adjourned. In the Year Book of the 20 H. 7. 13 a & b. which was the case of trespass against the executors for removing a furnace fixed with mortar by their testator, and annexed to the freehold, and which was holden to be wrongfully done, it is laid down, that "if a lessee for years make a furnace for his advantage, or a dyer make his vats or vessels to occupy his occupation during his term, he may remove them: but if he suffer them to be fixed to the earth after the term, then they belong to the lessor. And so of a baker. And it is not waste to remove such things within the term by some: and this shall be against the opinions aforesaid." But the rule in this extent in favour of tenants is doubted afterwards in 21 H. 7. 27, and narrowed there, by allowing that the lessee for years could only remove, within the term, things *fixed to the ground*, and *not to the walls*, of the principal buildings. However in process of time the rule in favour of the right in the tenant to remove *utensils set up in relation to trade* became fully established: and accordingly, we find Lord *Holt*, in *Pool's case* (d), laying down (in the instance of a soap-boiler, an under-tenant, whose vats, coppers &c. fixed had been taken in execution, and on which account the first lessee had brought an action against the sheriff), that *during the term*

The general rule.

Exceptions to this general rule.

Narrowing of this rule.

(a) 4 Co. 64, in Co. Litt. 53.

(b) Moore, 177.

(c) Hob. 234.

(d) Salk. vol. i. 368.

*the soap-boiler might well remove the vats he set up in relation to trade; and that he might do it by the common law, and not by virtue of any special custom in favour of trade, and to encourage industry; but that after the term they became a gift in law to him in reversion, and were not removeable. The indulgence in favour of the tenant for years during the term has been since carried still farther, and he has been allowed to carry away matters of ornament, as ornamental marble chimney-pieces, pier-glasses, hangings, wainscot fixed only by screws and the like (a). But no indulged case has yet gone the length of establishing that buildings subservient to purposes of agriculture, as distinguished from those of trade, have been removeable by an executor of tenant for life, nor by the tenant himself, who built them during his term.*

In deciding whether a particular fixed instrument, machine or even building, should be considered as removeable by the executor, as between him and the heir, the Court, in the three principal cases on this subject (b), may be considered as having decided mainly on this ground, that where the fixed instrument, engine or utensil (and the building covering the same falls within the same principle), was an accessory to a matter of a personal nature, that it should be itself considered as personality. The fire-engine, in the cases in 3 *Atkins* and *Ambler*, was an accessory to the carrying on the trade of getting and vending coals, a matter of personal nature. Lord *Hardwicke* says, in the case in *Ambler*, "a colliery is not only an enjoyment of the estate, but is part carrying on a trade." And in the case in 3 *Atk.* he says, "one reason, that weighs with me

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(a) *Beck v. Rebow*, P. Williams, vol. i. p. 94. *Ex parte Quincey*, Atk. Ch. Rep. vol. i. p. 477. and *Lawton v. Lawton*, ib. vol. iii. p. 13.

(b) *Lawton v. Lawton*, Atk. Ch. Rep. vol. iii. p. 13, which was the case of a fire-engine to work a colliery, erected by the tenant for life. Lord *Dudley v. Lord Ward*, *Ambler*, 113, which was also the case of a fire-engine to work a

colliery, erected by tenant for life. These two came cases before Lord *Hardwicke*. And *Lawton, Executor, v. Salmon*, E. 22 G. 3. 1 H. Blacks. 369, in notia, before Lord *Mansfield*, which was the case of *Salt pans*, and which came on in the shape of an action of trover brought for the salt-pans by the executor against the tenant of the heir at law.

in its being a mixed case, between enjoying the profits of the mill, and carrying on a species of trade; and as considering the cyder mill as properly an accessory to the trade of making cyder.

In the case of the salt pans, Lord Mansfield does not seem to consider them as accessory to the carrying on a trade, but as merely the means of enjoying the benefit of the inheritance. He says, "the salt spring is a valuable inheritance, but no profit arises from it unless there be a salt work; which consists of a building &c. for the purpose of containing the pans &c. which are fixed to the ground." "The inheritance cannot be enjoyed without them. They are accessories necessary to the enjoyment of the principal. The owner erected them for the benefit of the inheritance." Upon this principle he considered them as belonging to the heir, as parcel of the inheritance, for the enjoyment of which they were made, and not as belonging to the executor, as the means or instrument of carrying on a trade. If, however, he had even considered them as belonging to the executor, as utensils of trade, or as being removeable by the tenant, on the ground of their being such utensils of trade, still it would not have affected the question now before the Court, which is the right of a tenant for more agricultural purposes to remove buildings fixed to the freehold, which were constructed by him for the ordinary purposes of husbandry, and connected with no description of trade whatsoever: and to which description of buildings no case (except the *Nisi Prius* case of *Dean v. Allaley*, before Lord Kenyon, and which did not undergo the subsequent review of himself, and the rest of the Court) has yet extended the indulgence allowed to tenants in respect to buildings to purposes of trade. In the case of *Culling v. Tyfnal* (a), before Ch. J. Treby, at *Nisi Prius*, he is stated to have holden, that the tenant who had erected a barn upon the premises, and put it upon pattens and blocks of timber lying upon the ground, but not fixed in or to the ground, might by the custom of the

Lord Mansfield's opinion.

(a) Bull. N. P. p. 34.

country take them away at the end of his term. To be sure he might, and that without any custom; for the terms of the statement exclude them from being considered as fixtures, "they were not fixed in or to the ground." In the case of *Fitzherbert v. Shaw* (a), we have only the opinion of a very learned Judge indeed, Mr. Justice Gould, of what would have been the right of the tenant, as to the taking away a shed built on brick work, and some posts and rails which he had erected, if the tenant had done so during the term: but as the term was put an end to by a new contract, the question what the tenant could have done in virtue of his right under the old term, if it had continued, could never have come judicially before him at *Nisi Prius*: and when that question was offered to be argued in the Court above, the counsel was stopped, as the question was excluded by a new agreement. As to the case of *Penton v. Robert* (b), it was the case of a *cart-nish-house*, with a brick foundation let into the ground, of which the wood work had been removed from another place, where the defendant had carried on his trade with it. It was a building for the purpose of trade; and the tenant was entitled to the same indulgence in that case, which, in the case already considered, had been allowed to other buildings for the purposes of trade; as furnaces, vats, coppers, engines and the like. And though Lord Kenyon, after putting upon the ground of the leaning which obtains in modern times in favour of the interests of trade, upon which ground it might be properly supported, goes further, and extends the indulgence of the law to the erection of green-houses and hot-houses by nursery-men, and indeed by implication to buildings by all other tenants of land; there certainly exists no decided case, and, I believe, no recognized opinion or practice, on either side of Westminster Hall, to warrant such an extension. The *Nisi Prius* case of *Dean v. Allaley* (c) is a case of the erection and removal by the tenant of two sheds, called *Dutch barns*, which were, I will assume, unquestionably fixtures.

Dutch barns.

(a) H. Blacks. vol. i. p. 258.

(b) East, vol. ii. p. 88.

(c) Reported in Mr. Woodfall's book, p. 207, and Mr. Espinasse's, vol. ii. p. 11.

Lord Kenyon says, "the law will make the most favourable construction for the tenant where he has made necessary and useful erections for the benefit of his trade or manufacture, and which enable him to carry it on with more advantage. It has been so holden, in the case of cyder-mills and other cases, and I shall not narrow the law, but hold erections of this sort made for the benefit of trade, or constructed as the present, to be removable at the end of the term." Lord Kenyon here uniformly mentions *the benefit of trade*, as if it were a building subservient to some purposes of trade, and never mentions agriculture, for the purposes of which it was erected. He certainly seems, however, to have thought that buildings erected by tenants for the purposes of farming, were, or rather ought to be, governed by the same rules which had been so long judicially holden to apply in the case of buildings for the purposes of trade. But the case of buildings for trade has been always put and recognised as a known allowed exception from the general rule, which obtains as to other buildings; and the circumstance of its being so treated and considered establishes the existence of the general rule to which it is considered as an exception. To hold otherwise, and to extend the rule in favour of tenants, in the latitude contended for by the defendant, would be, as appears to me, to introduce a dangerous innovation into the relative state of rights and interests holden to subsist between landlords and tenants. But its danger or probable mischief is not so properly a consideration for a court of law, as whether the adoption of such a doctrine would be an innovation *at all*: and being of opinion that it would be so, and contrary to the uniform current of legal authorities on the subject, we feel ourselves, in conformity to, and support of those authorities, obliged to pronounce that the defendant had no right to take away the erections stated and described in this case.

*Postea for the plaintiff.*

In surveying dilapidations, it is necessary for the architect to know for what defects of that nature an action will lie at common law. A few lines therefore on that head may not be misapplied in this treatise. An action at law is, first, that

For what sort of dilapidations an action at law will lie.

right, which every man has of demanding in a court of justice, that which is due to him; and a reparation of the injury, that is done to him, either by deeds or words. Or as it is more briefly expressed in the præmium to the sixth title of the fourth book of Justinian's Institutes, "*Actio autem nihil est, quàm jus persequendi in judicii, quod sibi debetur.*"

An action will lie against destroyers of tenements.

Therefore an action will very justly lie against any tenant or other occupier of another's inheritance, for any injuries done by them to such property: and also against a tenant, either on the case, or for trespass, for dilapidations committed after the expiration of a notice to quit; as decided in the case of *Burchell v. Hornsby* (a), tried before the late Lord Ellenborough in 1808.

In an action for dilapidations, money cannot be paid into court on the common rule.

On whatever side the architect be employed, it should be remembered, that in an action for dilapidations, the defendant cannot pay money into court, on the common rule. This was decided in the case of *Salt v. Salt and Another* (b), wherein the plaintiff brought an action against the defendants as executors of the last incumbent of the rectory of Hildersham, in the county of Cambridge, for dilapidations, and the defendants paid 300*l.* into court under the common rule. To set aside which rule the plaintiff obtained another rule nisi, on the authority of the case of *Squires v. Archer* (c). It was argued (d) by the learned counsel Mr. Wilson, in support of the rule, that the demand, namely, 950*l.* so far from being a certain demand, was capable of being ascertained only by mere computation; and was perhaps of all others the most uncertain that could be brought, as it depended entirely on the opinions of architects and surveyors. In an action of covenant for not repairing, he contended, that it was clear that the defendant could not pay money into court. On the first day of the argument the court said, that in point of reason the defendant ought to be permitted to pay money into court, but wished to have an opportunity of looking into the cases before they de-

(a) Appendix, No. XXXV.

(c) Strange Rep. vol. ii. p. 206.

(b) Duffell & East, vol. viii. p. 4.

(d) In the King's Bench, Nov. 22, 1798.

cided the question; and on the second day the Chief Justice, Lord Kenyon, said, that they had looked into the cases, and were of opinion; that they did not warrant them in determining that the money should be paid into court in that action. In the case of *Squire v. Archer* (a), on the authority of which the rule *was* obtained, is so direct a decision on this point, it may be consulted with advantage.

Lord Kenyon's decision thereon.

An action on the case, says Mr. Hargraves, in a note to his edition of Lord Coke's *First Institute* (b), will lie for damages arising from the neglect to repair. The same learned editor says also in another note (c), that on special damage, an action on the case will lie for not repairing, as well as for a nuisance on the highway. To which Mr. J. H. Thomas, in a note on this note, in his *Systematic Arrangement* of the same work (d), says that this must be understood, where an individual is liable to repair; for it has been decided (e), that a person cannot maintain an action against the inhabitants of a county to recover satisfaction for an injury sustained by him in consequence of neglecting to repair a county bridge. So again, says Mr. Lord Coke (f), if two tenants in common, or joint tenants, of a house or mill, and it fall into decay, and the one is willing, and the other unwilling to repair the same, he that is willing can have a writ *de reparatione faciendâ* (g), and the writ says, *ad reparationem et sustentationem, ejusdem domus tenementi*. By which it appears that the owners are bound in that case *pro bono publico*, for the public good, to maintain houses and mills which are for the habitation and use of man.

An action on the case lies for neglect of repair.

Two tenants in common, one willing and the other unwilling to repair; how to act.

Alterations made to tenements, without leave of the landlord, or despoiling them against his wishes, such as altering a private house into a shop or warehouse, or *vice versa*, are illegal, and may be suspended during progress, by an injunction.

Tenants may not alter their landlord's tenements without leave.

(a) See the case in Fitzgib. Reports.  
(b) Co. 1st Inst. p. 56 b. See also Fitz. Nat. Brev. edit. 1730, p. 496.  
(c) Co. 1st Inst. p. 56 a.  
(d) Vol. I. p. 648.

(e) Russell v. County of Devon, Term Rep. vol. II. p. 671.  
(f) Co. 1st Inst. p. 54 b.  
(g) See Fitz. Nat. Brev. edit. 1730, fo. 137. Reg. fo. 163.



Pulling down a house and building a larger, punishable by law.

tion from the Court of Chancery; as may also the commission of, or threatening to commit waste, by a similar measure, and such injunctions have been granted (a). So can the lessee be similarly restrained from pulling down buildings, and not only so, but the Court, says Chief Baron *Camys* (b), will also compel him, if suffered to be decayed or dilapidated, to put them into the same condition as they were when he took them. So also, if the lessee of a house pulls it down and rebuilds it less than before (c), or if he rebuilds it of a larger size, to the prejudice of the lessor; for it is held to be more chargeable to repair (d). Also if he alters the house to the lessor's prejudice, as if he should turn two rooms into one, or *à converso* (e). For the reason, that if it be for the lessor's advantage, he may not chuse to admit it to be so, and he must be the best judge of his own property (f).

Converting buildings of one description into another without leave, illegal.

This law against the conversion of tenements without leave, is well illustrated in the case of *Cole* against *Greene* (g); tried before the Court of Hustings, in the City of London, which is discussed in the 4th Chapter of this Treatise on Waste, and given at length in the Appendix.

Injunction, a remedy against premeditated dilapidation.

The injunction to be applied for as a remedy in the before-mentioned instances of alteration or conversion without leave, is, says Sir *T. E. Tomlins*, in his *Law Dictionary* (h), a kind of prohibition granted by Courts of Equity in divers cases, and is generally grounded on an interlocutory order or decree out of the Court of Chancery, or the equity side of the Exchequer, to stay proceedings in Courts of Law; and sometimes (i) in the nature of a prohibition, it is issued to the Spiritual Courts.

(a) *Ves. Rep.* vol. xiv. p. 326.

(b) *Com. Dig.* tit. *Chancery*, D. 11.

(c) *Roll. Rep.* part ii. p. 815.

(d) *Ibid.*

(e) *Graves's case*, Hilary Term,

4 James 1. C. P.

(f) *Kelynge's Rep.* p. 39. *Roll. Rep.* part ii. p. 815.

(g) *Lev. Rep.* part i. p. 309.

*Case Samd. Rep.* vol. ii. p. 292. Appendix, No. XXXVL

(h) *Tomlins's Law Dictionary*, 2d ed.

*Injunction.*

(i) See the preceding Chapter on

*Ecclesiastical Dilapidations*, page 42.

This equitable interposition of Chancery against dilapidations, may be very properly applied to restrain tenants from spoliations, either in the act of commission or threatened. The following cases, illustrative of the nature of injunctions against dilapidations, may serve to explain the subject. In the case of *Withers v. The Dean and Chapter of Winchester and others* (a), the plaintiff prayed for an injunction to restrain the defendants, their woodwards, agents and workmen, during the continuance of his lease, which he held under them, from making any sale or grant, or for taking or cutting any of the timber or other trees then growing or to grow on the premises therein specified, except for the necessary building, repairing, upholding and amending of the cathedral church of Winchester, or of the church buildings thereunto belonging; and in such case leaving upon the premises, from time to time, sufficient timber for the use of the buildings belonging to the estate, for fences and other similar purposes, as expressed in the lease by which he held the premises.

Nature of such remedy.

Illustrative cases.

*Withers v. The Dean and Chapter of Winchester and others.*  
Plaintiff's case.

The defendants stated in their answer, that timber was at that time wanted for the repairs of the cathedral and other church buildings, to so considerable an amount that the whole of the timber then growing on the premises would be insufficient for the purposes of supplying them; and that they were in the habit of selling the timber on other estates belonging to them in distant parts of the country, and applying the produce to the purposes of repairs; and also insisted, that they were not by the covenants in the indenture, restrained from so disposing of the timber in question.

Defendants' answer.

On a motion having been made to dissolve the injunction, it was argued by the counsel, Messrs. (now Sir John) Leach, (who, by the way, was educated originally for an architect in Sir Robert Taylor's office,) Bell and Dowderwell, who insisted on the right of the defendants, so to act for the purposes of repairs, and that such right extended even to ornamental timber, although out of courtesy to their tenants, they had

Legal argument for the defendants.

(a) Merivale's Chan. Rep. vol. III. p. 421.

not usually exercised such right with regard to ornamental timber; that it would be attended with great inconvenience and loss to the defendants, if it should be held that they were bound to apply the identical timber in question, and not the produce arising from its sale, as the premises in question were at the distance of eighteen miles from the cathedral, and the principle, of course, extended to all the estates belonging to the defendants, let them be situate at whatever distance they might: and they referred to a case, recently decided by the Master of the Rolls, of the Attorney General on the part of *Exeter College v. Geary* (a), and also to what was said by the Lord Chancellor *Hardwicke*, in the case of *Knight v. Mosely* (b).

Argument for the plaintiff in support of the injunction.

On the part of the plaintiff, Sir *Samuel Romilly*, and Mr. *Shadwell* argued in support of the injunction, and observed that this question was wholly independant of what might or might not be the true construction of this covenant; as it affected the general right of ecclesiastical corporations with respect to the cutting of timber on their estates; as to which they argued that it might be generally stated, that ecclesiastical persons have no such right except for the purpose of necessary repairs; and that the statute (c) which restrains alienation by such persons, on the ground of dilapidation, although it refers in express words only to the ruin and decay of buildings, is by a parity of reason to be extended to timber or any thing else, which constitutes part of the inheritance (d).

Lord Eldon's decree.

The Lord Chancellor *Eldon*, in giving his judgment, said, among other things (e), that if the dean and chapter wanted the whole of the timber for the purposes of repairs, there

(a) Meriv. Ch. Rep. vol. iii. p. 513.

(b) Amb. Ch. Rep. p. 176.

(c) 13 Eliz. c. 10.

(d) See also Burn's Ecclesiastical Law, vol. ii. p. 152, and the authorities there referred to.

(e) As this case is introduced principally to show the power of the Court

of Chancery to issue injunctions or prohibit the committing of dilapidations, it is much abridged from Mr. *Mortons's Reports*, and the essence only extracted. The inquiring reader, who wishes more of the detail is therefore referred to that book for the full report.

could be no doubt, independantly of the covenant, that they would be justified in insisting that the whole should be applied. Unless the interests of deans and chapters, said his Lordship, are capable of being distinguished from those of other ecclesiastical bodies, in some respect which he was unable to discern, they had this limited right to the timber, without any special provision.

Lord Eldon concurred in the opinion of Lord Chief Justice Eyre, in the case of *Jefferson v. The Bishop of Durham* (a), on the good effect that was likely to result from the discussion of such questions. In that case, it was ruled, that as only a patron can prevent a rector or vicar, so only can a bishop be prevented from exercising the right in question, by *prohibition* or *injunction* at the suit of the Crown, by its Attorney-General.

The Crown only can prohibit a bishop from committing dilapidations.

The case of *Mosely v. Knight* (b) decides that the patron has the same right against a rector, and therefore the landlord against his tenant, that the Crown or Metropolitan, has against a bishop. In that case, Lord Hardwicke expressly declared that parsons may not only fell timber or dig stone to repair; but that they have been sometimes indulged in selling such timber or stone, where the money raised by such sale has been applied in repairs.

In the before-mentioned case of *Jefferson v. The Bishop of Durham*, Mr. Justice Heath declared, "That the Crown has its officers, whose duty it is to watch over its interests: the metropolitan may proceed against the bishop for dilapidation; the officers of the Crown and the metropolitan may exercise their discretion."

It may be well for the architect who is employed either for or against persons who have committed or suffered dilapidations, to be aware that, persons against whom injunctions for

Persons committing dilapidations after injunction or prohibition, guilty of contempt.

(a) Bos. & Pul. vol. i. pp. 120 & 129.

(b) Ambl. Ch. Rep. p. 176.

A proper remedy necessary before applying for an injunction.

dilapidations, waste, alterations without leave, and such like, are granted, that Lord Chancellor *Hardwicke*, in the case of *Powell v. Follett* (a), held, that if the party, his surveyor or his attorney, having knowledge of an injunction having been granted, proceed, he is guilty of contempt, even though the injunction be not sealed. Also, that when injunctions to stay dilapidations, spoliation, waste or alterations without leave, are applied for, the Court, said Lord *Kenyon*, as Master of the Rolls, sitting for the Lord Chancellor (b), in the case of the *Countess of Strathmore v. Bowes*, expects such affidavits to be clear and positive as to the acts done, and not to speak vaguely from hearsay or belief. Therefore a proper survey is necessary.

A tenant neglecting to repair his tenement, and it becoming thereby a nuisance to his neighbour, how to remedy.

In certain cases, wherein a tenant or other occupier of a house, by neglecting to repair it, suffers it to become a nuisance and an object of danger to his neighbours and the public, the law affords a remedy, and a speedy relief, besides that of having it boarded in by the inquest. Lord *Coke* says (c), if a man have a house near to my house, and he suffereth his house to become so ruinous as it is like to fall on my house (d), I may have a writ *de domo reparanda*, and compel him to repair his house. But a *præcipe*, he says, lieth not, *de domo*, but *de messuagio*.

The Court of Chancery will grant an injunction against dilapidation.

The Court of Chancery will grant an injunction at the suit of a ground-landlord, to stay waste or premeditated dilapidations by an under-lessee, who holds by lease from the original lessee: as was exemplified in the case of *Farrant v. Lovel*, which was argued and determined in the time of Lord Chancellor *Hardwicke*, February 12th, 1750 (e).

The first step was, that a bill was brought by the ground-landlord, to stay waste in the under-lessee, who held by lease from the original lessee.

(a) Dick. Ch. Rep. vol. i. p. 116.

(b) Ibid. vol. iii. p. 674.

(c) 1st Inst. part i.

(d) Reg. 153. Fitz. Nat. Br. 127.

4 E. 2. Vouch. 244.

(e) Atk. Ch. Rep. vol. iii. p. 723. Case 273.

To which Lord *Hardwicke* replied, that on a certificate being produced of waste or dilapidations, he was of opinion that the plaintiff had the same right of equity as in other cases of injunctions. Lord *Hardwicke's* opinion.

That a remainder-man in fee might also have an injunction to stay waste or dilapidations, in the first tenant for life, notwithstanding an immediate estate for life. As where there is tenant for life, remainder for life, or remainder in fee; yet the Court, on a bill brought by the remainder-man in fee, to stay waste in the first tenant for life, will, notwithstanding the intermediate estate for life, upon a certificate of the circumstances of the waste or dilapidations, which ought to be most carefully and correctly drawn up, grant an injunction.

And, that if a mortgagee cuts down timber, and does not apply the money arising from the sale in sinking the interest and principal, is to be considered as a dilapidator, and the mortgagor may have an injunction to stay waste. Or as his Lordship expressed it "So where a mortgagee in possession commits waste by cutting down timber, and the money arising by the sale of the timber, is not applied in sinking the interest and principal of his mortgage, the Court, on a bill being brought by the mortgagor to stay waste, and a certificate thereof being produced, will grant an injunction." Case of a mortgagee dilapidating.

So where there is only a mortgage for a term of years, and the mortgagor commits waste or dilapidation, the Court, on a bill by the mortgagee to stay waste, will grant the mortgagee an injunction, for they will not suffer a mortgagor to prejudice the incumbrance.

For these reasons his Lordship granted an injunction to stay waste:

And in another case, that of *Godfrey v. Watson* (a), the same high authority, Lord *Hardwicke*, said, that a mortgagee A mortgagee is not bound to expend money except on necessary repairs.

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(a) Atk. Ch. Rep. vol. III. p. 517. Case 181.

in possession is not obliged to lay out money any further than to keep the estate in necessary repair; but if a mortgagee has expended any sum of money in supporting the right of the mortgagor to the estate, where his title has been impeached, the mortgagee may certainly add this to the principal of his debt, and it shall carry interest.

Tenants for life *without impeachment of waste*, may not commit dilapidations.

In surveying the dilapidations or waste committed on a large estate, the architect should pay particular attention to the ornamental as well as the useful timber that may be growing, and threatened to be cut down, or actually cut down and thereby dilapidation and waste be committed on the estate. Even if the dilapidator be tenant for life, *without impeachment of waste*, which title gives a great authority over the estate, yet the Court of Chancery will grant an injunction to restrain him from cutting down trees in lines or avenues, or ridings in a park, as they are for ornament.

This was determined by Lord *Hardwicke* (a), in Easter Term, May 9, 1744, in the case of Sir *Herbert Packington*, who was tenant for life, without impeachment of waste, of an estate at Westwood, in Worcestershire, and being out of the kingdom, his agent was made defendant to a bill brought to stay waste by Mr. *Packington*, son of Sir *Herbert*, and first tenant in tail, and he put in an answer.

The motion was for an injunction to stay Sir *Herbert Packington's* agent from cutting down trees in the park at Westwood, which are either an *ornament or shelter* to the mansion-house. To which the Lord Chancellor *Hardwicke* gave as a reason why the common law gave so large a power to the tenant for life, *without impeachment of waste*, was for the interest of the public, as timber might thereby circulate for shipping and other uses. For it might be for the interest of private persons if the common law had not given so large a power to *tenants for life without impeachment of waste*, equal to *tenants in fee*. But he said that the common law thought

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(a) Atk. Ch. Rep. vol. iii. p. 215. Case 73.

it for the interest of the public that it should be so, that timber might by such means be more easily procurable for shipping and other similar uses.

But, he said, the Court of Chancery had restrained their power greatly, in comparison of what it was formerly.

Lord Hardwicke's opinion on this head.

The first cause quoted by his Lordship, was that of *Vane v. Lord Bernard* (a), which came before Lord Cowper, who restrained the defendant from pulling down Raby Castle.

Lord Bernard restrained from pulling down Raby Castle.

The Court of Chancery, he said, had gone farther, and had restrained *such tenant for life* from cutting down timber that was either ornamental or useful as a shelter of the house, and farther still in the case of *Charleton v. Charleton*, in extending it to the case of a park.

There was indeed, he confessed, a difference of opinion between the then Lord Chancellor King, and the Master of the Rolls, but only in part, for Lord King continued the injunction as to trees for ornament or shelter, but dissolved it as to straggling trees.

Lord Hardwicke farther made this strong observation, that it was very proper for the Court of Chancery to preserve trees that are a shelter to the mansion-house; and that in the present case, only three oaks had been cut down, and if there was no intention to commit further waste, it would be material; but this appeared to be but the beginning of waste and dilapidation, for Sir Herbert Packington's letter, written in 1741, whilst he was abroad, had been read, in which he says, if his son would not join him in cutting off the entail, he would give orders for cutting down all the ornamental timber trees.

The question therefore was, whether those were grounds for an injunction to stay waste and dilapidations.

The question in this case.

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(a) Vern. Chan. Rep. vol. ii. p. 738.



First objection.

The first objection, said Lord *Hardwicke*, was, that those trees grew in a wood, and had arisen spontaneously, naturally and by accident, having been self-sown, and not from planting.

Trees whether planted or self sown, if ornamental must not in certain cases be cut down.

But his Lordship did not think that this objection would hold good, because, he said, whether trees grew naturally or were planted, if they serve as an ornament or shelter, it amounted to the same thing. And he thought it to be very probable that the situation of the mansion-house had been chosen for the sake of cutting ridings and vistas through the woods. And he mentioned two instances of that kind of his own acquaintance, namely, Hamstead, a seat of Lord *Craze*, and another in *Essex*.

Lord *Hardwicke's* order in this case.

His Lordship therefore restrained the defendant from cutting down trees in lines, or avenues or ridings in the park, and likewise from cutting down trees that were not of a proper growth to be cut. But upon a suggestion, that this might create disputes, as to what were of proper growth, and that very little young timber was growing in that park, his Lordship left out the last part of the order, and granted the injunction as to the other.

Cutting down decayed timber as much waste as cutting down any other.

In another case, that of *Perrot v. Perrot (a)*, Lord *Hardwicke* determined that the cutting down decayed timber, is as much waste as cutting down any other, saying, that "though the defendant's counsel have attempted to make a distinction between cutting down young timber trees, that are not come to their full growth, and *decayed* timber, I know of no such distinction, either in law or equity.

Case of a building lease where a third person is assignee.

In a case where a person lets on a building lease of sixty-one years of a house to another, who assigns over the lease to a third for the remainder of the term; he rebuilds the house at a large expense, and pays the reserved rent to the ground-lord, who receives it till his death; and his successor brings an ejectment, and recovers at law for want of the usual

(a) *Atk. Ch. Rep.* vol. iii. p. 95, Case 35.

covenants in building leases, the Court of Chancery gave relief on an application for an injunction, by ordering a new lease to be executed with proper covenants, and the plaintiff to hold the premises for the remainder of the term.

This was determined by Lord *Hardwicke*, in March 1748, in the case of *Stiles v. Cowper* (a), the leading points of which, as being most interesting to architects and builders, are as follow:—

In 1700, Sir *John Cowper*, the father of the defendant, who was entitled to an undivided moiety of houses with Mr. *Henley*, in Portugal Row, Lincoln's Inn Fields; and by a private act of parliament, empowered to make a partition, and let out his moiety on a building lease for sixty-one years, to Mr. *Ward*, reciting therein the power given him by the act of parliament, of leasing, and a liberty to the lessee to quit after the first twenty years, on giving proper notice.

Mr. *Ward*, some time before 1716, assigned over the lease to *Haskins Stiles*, for the remainder of the term, who, in the year 1716, re-built the house, and laid out about 5000*l.* for this purpose, and constantly paid the rent reserved under the lease, of 40*l.* per annum, to Sir *John Cowper*, till 1729, when the lessor died, who was only tenant for life; and on his death the defendant, his eldest son, became entitled to it as the first remainder-man in tail.

From the year 1729 to 1735, the defendant thought proper to receive the rent from Mr. *Stiles*, and during that time the tenant, at his own expense, built new offices.

It appeared to the Court, upon reading the lease, that the covenants usual in building leases, were not inserted here.

The defendant, after this acquiescence, and receiving the rent, brings an ejectment against the plaintiff, for the posses-

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(a) Atk. Ch. Rep. vol. iii. p. 698. Case 263.

sion, as devisee of Mr. *Stiles*, and recovers at law for want of the aforesaid covenants.

The plaintiff brings his bill here for an injunction to stay the defendant's proceedings at law, and to be quieted in the possession of the house, under the lease and assignment.

To this Lord *Hardwicke*, the Lord Chancellor, observed, that though the acceptance of rent under a lease, by issue in tail, will bind them, where they claim *per formam doni* from the lessor, yet this alone will not bind the remainder-man in tail, who claims the leasehold estate by purchase, but is a circumstance however, in favour of the lessee; and when the remainder-man lies by and suffers the lessee or assignee to rebuild, and does not by his answer deny that he had notice of it, all these circumstances together will bind him from controverting the lease afterwards.

But the defendant's counsel alleging, if the house should be burnt down, the plaintiff, by the lease, is expressly exempted from re-building, and might, the next day after such accident of fire, give notice to quit; his Lordship directed a new lease to be executed, with the proper and usual covenants, for the residue of the term.

And upon executing such lease, his Lordship decreed the plaintiff to hold and enjoy the premises in question quietly for the residue of the term in the lease, against the defendant, but no costs to be paid on either side.

Whether conservatories, virandahs &c. may be removed.

It is a question worthy of the greatest attention from the architect, whether conservatories, virandahs and such like accessorial buildings, may be removed by tenants, or whether they must be left and subjected to the law of dilapidations, if damaged, neglected, or otherwise out of repair.

Lord *Kenyon* considered they may.

Conservatories, green-houses, hot-houses and other similar erections, put up by nursery-men and gardeners at their own expense, may, according to the before quoted case of *Penton*

*v. Robert (a)*; be removed; for it was there expressly ruled by Lord *Kenyon*, that such buildings may be taken away, although they were built of wood on foundations of brick, being for the purpose of carrying on his trade. Therefore, according to this decision, they are not liable to charge for dilapidations, or to be kept in repair by the tenant.

But Lord *Ellenborough*, however, on the contrary, held in the often quoted case of *Ehnes v. Maw (b)*, disapproved of this opinion of his learned predecessor; and Messrs. (Professors) *Amos and Ferard (c)*, in their Treatise on the Law of Fixtures, say there is no reported case in which this important question has been expressly decided. But there seems, say these learned authorities, to be no reasons why hot-houses &c. should not be removed as well as trees in a nursery ground, at least on the principle of trade. In the case of *Buckland v. Butterfield (d)*, tried before Chief Justice *Dallas*, it was decided, that a conservatory erected upon a brick foundation, affixed to and communicating with rooms in a dwelling-house, and communicating with it by windows, and a flue passing into the parlour chimney, cannot be removed by a tenant for years, who had erected it during his tenancy, although he had a reversion in fee after the death of his lessor. In this case (e), a manuscript case was cited by Mr. Serjeant *Blossett*, in which it is said to have been determined, that glasses and frames resting upon brick-work, in a nursery ground, were not removeable. Therefore, till such a decision, buildings of this sort, unless a special covenant be made between the landlord and tenant concerning them, for *modus et conventio vincunt legem*, tenants erecting such buildings should be careful not to attach them to the freehold, by constructing them on brick foundations sunk or let into the ground.

Lord *Ellenborough* held they were not.

Cannot be removed by a tenant for years.

Remedies.

Concerning virandahs, the law is a little more clear and certain, for in the following case of *The Administratrix of Penry*

The law concerning virandahs.

(a) East's Rep. vol. ii. p. 91.

(d) Brod. & Bing. vol. ii. p. 58.

(b) See ante, p. 137.

(e) J. B. Moore's Rep. vol. iv. p. 40.

(c) Amos and Ferard, p. 66.

*v. Brown(a)*, tried before Lord Tenterden, when Chief Justice Abbott, on Tuesday, July 30th, 1818, it was held that the tenant of a house, covenanting to keep in repair the premises and all erections, buildings and improvements erected on the same during the term, and to yield up the same at the end of the term, cannot remove a virandah erected during the term, the lower part of which is affixed to the ground by means of posts.

It was an action on a covenant in a lease of a house, by which the defendant covenanted to repair, and keep in repair, the premises, and all erections, buildings and improvements which might be erected thereon during the term, and yield up the same in good and sufficient repair &c.

It appeared that during the term, the defendant had erected a virandah, the lower part of which was attached to posts, which were fixed in the ground.

Chief Justice Abbott (Lord Tenterden) was of opinion, that this virandah fell within the terms of the covenant, and that the defendant could not remove any part of it.

Verdict for the plaintiff for the value of the virandah.

Messrs. Campbell and Maule, were Counsel for the plaintiff, and Messrs. Marryatt and Lawes for the defendant.

Of chimney-pieces, dressers, doors, blinds, coppers, cupboards, fixtures &c.

As the various articles of chimney-pieces, dressers, doors, blinds, coppers, cupboards and other things of the nature of fixtures, whether of landlords or of tenants, often come into the architect's practice in surveying the dilapidations of tenements, it is necessary that he should discriminate correctly between the various denominations of fixtures, and whether they are so, or part and parcel of the freehold and appurtenant to the house.

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(a) Stark. N. P. vol. ii. p. 403.

Fixtures, according to Professor Ames and Mr. Ferard's (a) definition, or rather description, are those personal chattels which being annexed to tenements, may afterwards be removed. This is rather vague, but the authors themselves confess (b), that the term "fixtures," is used by the Courts, and amongst the text-writers, without much precision.

The term "fixtures" very vaguely applied.

The genus "fixtures," I have ventured (c) to divide into four species, namely, *landlord's*, *tenant's*, *moveable* and *immoveable*.

Four sorts of fixtures.

*Landlord's fixtures* I conceive to be such as are immovably attached to the tenement, and are parcel of the estate, whether erected by the tenant or not; and also such as are affixed by the landlord or freeholder, and let by him on hire to the tenant; in the nature of usufruct, or the right of enjoying things which are the property of another (d), but on condition of preserving them substantially. Such fixtures, to prevent disputes, should be specified in a schedule attached to the deed by which the tenement is held.

Landlord's fixtures.

*Tenant's fixtures* I also conceive to be those which are generally annexed or put up by the tenant, or purchased by him of his predecessor or his landlord, and are to be considered more in the light of furniture, personal chattels or ornaments, added to the house, than as incidents or appurtenances belonging thereto, which are more usually parcel of the freehold.

Tenant's fixtures.

*Moveable fixtures* are such parts of the accessories of a building, as can be removed without damage to the estate, and may belong either to landlord or tenant, and not appurtenant to the freehold.

Moveable fixtures.

(a) Ames and Ferard's Law of Fixtures, p. 2.

(b) Ibid. p. 11.

(c) In Architectural Jurisprudence, tit. Fixtures, p. 203.

(d) See ante, p. 125.

Immoveable  
fixtures.

*Immoveable fixtures*, on the contrary, are such as cannot be detached from the freehold without damage to the estate, and consequently belong to the building to which they are attached, as part and parcel of the freehold. Whatever is permanently attached to houses and other buildings, such as things fastened thereto with iron, lead, plaister or any other mode, indicative of permanency, was reputed by the ancient Roman jurists to be immoveable (*a*).

Chimney-  
pieces.

By the rule of law, that *whatever is affixed to the freehold becomes a part of it*, chimney-pieces, even if put up by the tenant, become the property of the landlord, and cannot be removed without being liable to an action for the commission of waste and dilapidation. Sir *William Blackstone*, in his excellent *Commentaries on the Laws of England* (*b*), says, "that whatever is strongly affixed to the freehold or inheritance, and cannot be severed from thence without violence or damage" or as the learned *Spelman* says in his Glossary (*c*), "Quod ab ædibus non facile revellitur" is become a member of the inheritance, and shall thereupon pass to the heir:—as chimney-pieces, pumps, old fixed or dormant tables, benches and the like (*d*). A very similar notion to this, says *Blackstone* (*e*), prevails in the Duchy of Brabant, where they rank certain things moveable, amongst those of the immoveable kind; calling them by a very particular appellation, *prædia volentia*, or volatile estates; such as beds, tables and other heavy implements of furniture, which as an author of their own (*f*), observes, "Dignitatem istam nacta sunt, ut villis, sylvis et ædibus, aliisque prædiis, comparentur; quod solidiora mobilia

Volatile es-  
tates.

(a) *Fondi nihil est, quod terra se tenet. Aedium autem multa esse, quæ ædibus adfixa non sunt, ignorari non oportet, ut putæ, seras, claves, claustra. Inst. Dig. lib. xix. tit. 1. leg. 17. pr. Quæ tabulæ pictæ protectoris includantur, itemque crustæ marmoræ, ædium sunt. Id. § 3. Item constat, sigilla, columnas quoque, et personas ex quorum rostris aqua salire solet,*

*villæ esse. Id. § 9. Labeo generaliter scribit, eaque perpetui usus causa in ædificiis sunt, ædificii esse. Id. § 7.*

(b) Vol. ii. p. 428.

(c) Page 277.

(d) Mod. Rep. vol. xii. p. 520.

(e) Vol. ii. p. 428.

(f) *Stockmann de Jure Devolutionis*, ch. 3. § 16.

*spis ædibus ex donationes patrisfamilias cohaerere videantur, et pro parte ipsarum ædium æstimentior."*

He also says, on the authority of Sir *Thomas Hetley* (a), that whatever does a lasting injury to the freehold or inheritance is punishable as waste: therefore removing wainscot, floors or other things once fixed to the freehold of the house, is waste (b); but on the authority of Lord *Hardwicke* in the before quoted case of *Ex parte Quincey* (c), he adds, that *during the term*, the lessee may remove marble chimney-pieces and the like, which he himself had erected, without being punishable for waste; but he cannot do so *after* the expiration of his term.

Marble chimney-pieces may in some cases be removed.

So also in the case of *Allen v. Allen* (d), it appears that marble chimney-pieces and glasses are ornaments allowed to be taken down by tenants, and taken in execution. Lord *Hardwicke* also, in his before quoted order in the case of *Lawton v. Lawton* (e), observes, that what would have been punishable as waste in King Henry the Seventh's time, as removing wainscot fixed by screws, and marble chimney-pieces, is now allowed to be done.

Professor *Amos* and Mr. *Ferard* also agree in their able *Treatise on the Law of Fixtures*, say (f), that "It may be questioned when an unqualified right to take down chimney-pieces would be sanctioned by the Courts in the present day." And Lord *Holt*, in the case of *Poole v. The Sheriff*, seems to agree in this, and selects hearths and chimney-pieces as the kind of additions to a tenement that a tenant cannot remove. The right of taking away such articles, on the ground of their intrinsic value, and the great expense incurred by the tenant in erecting them, although frequently urged as an argument in proof of such right, cannot, I conceive, be supported by any competent authority; but, on the contrary, that

But an unqualified right to do so is doubtful.

(a) Hetley's Rep. tem. Cha. 1. fo. 35.

(b) Co. Rep. vol. iv. p. 64.

(c) Atk. Ch. Rep. vol. i. p. 477.

(d) Moseley's Rep. p. 112.

(e) Atk. Ch. Rep. vol. iii. p. 15.

(f) Page 81, n.



under the before-mentioned general rule of law, that *whatever is affixed to the freehold becomes a part of the freehold*, a tenant is liable to punishment for waste and dilapidation, if he pull down the shelves, closets, presses, wardrobes, dressers, chimney-pieces &c. belonging to the house (*a*).

**Doors.**

The doors of a house also by the same rule of law, are to be considered as part and parcel of the freehold, being a portion of the incidents of a house, and necessary for its construction and safety (*b*). Their damages therefore, must be repaired by the tenant or punishable as waste and dilapidation, and their removal by re-instatement or a similar penalty. Chief Baron *Comyns* (*c*), in his learned *Digest of the Laws of England*, says, that *goods and chattels go with the house*, and enumerates *doors* as among such *goods* and *chattels*. It is therefore a good rule with architects in doubtful cases to determine whether a door, the property in which is questionable, be such a chattel as must, by the aforesaid rule of law, go with the house.

A difference  
between outer  
and inner  
doors.

Doors have been again determined, and so considered, if hanging only on hooks (*d*), and are not distrainable (*e*). Yet the Court held a difference in Queen Elizabeth's reign (*f*), between outer doors and inner doors, saying that the latter might be moveable, as being less necessary to the house. But it is not very likely that such a doctrine would be now held after the above named subsequent decisions.

**Dressers.**

So also, are dressers to be considered as parcel of the freehold, and tenants are punishable for waste on removing or dilapidating them (*g*), as they are generally considered as articles necessary to complete a house, and may yet generally be removed.

(*a*) Bulst. vol. ii. p. 113. Cro. Jac. p. 329. Salk. vol. i. p. 368. Blackst.

Rep. vol. ii. sect. iv. Ves. & Bea. Ch. Rep. vol. ii. 349.

(*b*) Shep. Touch. pp. 469, 470.

(*c*) Title Biens, D.

(*d*) Sir Francis Moore's Rep. p. 177.

(*e*) Amos and Ferard, p. 257.

(*f*) Sir F. Moore's Rep. Cooke's Case, p. 177.

(*g*) Bulstr. vol. ii. p. 113. Salk. vol. i. p. 368.

The general law rule before mentioned as to fixtures in general, was, as I have there stated, that *whatever was fixed to the freehold became part of it*, and, as a fixture, could not be taken away. But of late years, there has been much relaxation of the severity of this rule, and many exceptions taken, which it is the architect's duty who undertakes the surveying of dilapidations, to make himself acquainted with.

Modern rule as to fixtures in general.

The first relaxation or exception to this general rule is, that now allowed between landlord and tenant, the latter of which may, according to present custom, take away what ornamental or additional fixtures he may have put up himself, or have purchased of his predecessor, having a right so to dispose of them; but he is bound, in so doing, not to commit any damage, and to re-instate or re-place those which were removed to make way for the improved fixtures, or others of equal value.

Relaxations and exceptions to the ancient rule.

So also with lead sinks or cisterns that have been affixed in lieu of stone or wood, for which also he is bound by the same rule, and must replace what improved sinks or cisterns he takes away, with the same that he removed, or others of equal value, or pay his landlord a sum equal to their value.

Lead sinks, cisterns &c.

Utensils in trade, coppers, grates, hangings, pier glasses, pictures on panel and such like, though they may form part of the wainscot and fixed with nails and screws to the freehold, if they were erected or purchased by the tenant from his predecessor, he having a right so to sell them, are to be considered as the property of the tenant, and may legally be removed by him, as not forming, by the modern rule, any part of the freehold (a). But such removal, it should be remembered, must be within the term of the lease, or the person so removing them will be considered as a trespasser. If, however, the landlord lets to his tenant with his house, certain fixtures, such as coppers, stoves, grates &c. that he may have put up himself, or purchased of a preceding tenant, they must

Utensils in trade, coppers, grates &c.

(a) Atk. Ch. Rep. vol. i. pp. 477, 478, P. Wms. vol. i. p. 94.

be left by the tenant at the expiration of his term, and be subject like the rest of the property to the law of dilapidations and waste, reasonable wear and tear being allowed.

Machinery is in general tenant's fixtures.

Rule as to stills.

Machinery, is in general held to be tenant's fixtures, and in such cases may be removed during the term, if done without injury to the freehold; but if they are affixed to the freehold they are liable to the before-mentioned rules of trade fixtures (a). In the case of *Horn v. Baker* (b), it was held by the Court of King's Bench, that there was a material distinction between the stills that were set in brick-work, and such of the vats that were actually affixed to the ground, which become appurtenant to the freehold, and those vats which were merely resting on pieces of timber called horses. The Court justly considering *the former* as immoveable fixtures, and *the latter* as personal goods and chattels, from the manner in which they were connected with the freehold. And in the case of *Davis v. Jones* (c), the same Court held, that certain parts of a machine which had been put up by the tenant during his term, and were capable of being removed without either injuring the other parts of the machine or building, and had been usually valued between the outgoing and incoming tenant, were the goods of the outgoing tenant, and not of the landlord, and for which he might maintain an action of trover.

Coppers, blinds, stoves &c.

Coppers, stoves, blinds, mash-tubs, water-tubs &c. are held by law to be tenant's fixtures and removeable as such. In the case of *Colgrave v. Dias Santos* (d), wherein the owner of a freehold house, in which there were various fixtures, sold it by auction, and said nothing about fixtures. A conveyance of the house was executed, and possession given to the purchaser, the fixtures still remaining in the house. Lord Tenterden, (then Chief Justice Abbott) held at Nisi Prius, and the Court of King's Bench subsequently confirmed his opinion, that stoves, cooling-coppers, mash-tubs, water-tubs, blinds and such like were removeable as between landlord and tenant; that in this

(a) See ante, p. 121, et seq.

(b) East's Rep. vol. ix. p. 215.

(c) Barn. & Ald. vol. ii. p. 165.

(d) Barn. & Cress. vol. i. p. 77.

instance they were conveyed to the purchaser with the freehold, and that even if they were not, the vendor, after giving up possession, could not maintain an action of trover for them. A few other articles which were not fixtures were also left in the house, which were demanded, together with the other articles, as fixtures; and the Court held, that upon this evidence the plaintiff could not recover them in this action.

In *Sheppard's Touchstone* (a), coppers are reckoned incidents of a house that go to the tenant.

In the case of *Lee v. Ridsen* (b), Chief Justice Gibbs held, that grates set in brick-work, although attached by mortar or cement to the freehold might be removed by the tenants, as being personal goods and chattels. As did Sir John Bayley in the Court of King's Bench, in the case of *The King v. The Inhabitants of Saint Dunstan in the East* (c). So in the case of *Harvey v. Harvey* (d), which was an action of trover by the executor against the heir, the Chief Justice held, that hangings, tapestry and iron backs to chimneys, belong to the executor.

Stoves set in brick-work.

Where a house is occupied by its owner, the fixtures are considered as part of the freehold, and it was so decided by the Court of King's Bench, in the case of *Winn v. Ingilby* (e), and also that a sheriff has no right to seize fixtures under a *feri facias*, where the house in which they are affixed is the freehold of the person against whom the execution is issued.

Fixtures of houses occupied by the freeholder.

In renewing the lease of a house, or in valuing the building fixtures, the architect should be aware that on a new lease being granted, all the lessee's fixtures become the property of the landlord, unless it be covenanted to the contrary. This rule of law was exemplified in the case of *Thresher v. The East*

Lessee's fixtures become the property of the landlord in a new lease, if not covenanted to the contrary.

(a) Pages 469, 470.

(d) Strange's Rep. vol. i. p. 1142.

(b) Taunt. vol. vii. p. 191.

(e) Barn. & Ald. vol. v. p. 625.

(c) Barn. & Cress. vol. iv. p. 686.

Quære as to  
lime-kilns.

*London Water Works Company* (a), wherein the Court held, that a lessee who had erected fixtures for the purposes of trade, upon the demised premises, and afterwards takes a new lease, to commence from the expiration of his former one; which new lease contains a covenant to repair, is bound to repair those fixtures, unless strong circumstances existed to show that they were not intended to pass under the general words of the second demise. It was made a *quære* by Mr. *Pratt* (b), whether lime-kilns, erected for the purposes of trade, are removeable; and also whether machinery fixed by bolts to the floor of a factory, are distrainable by a landlord for rent; as held in the case of *Duck v. Braddyl* (c).

Glass generally a parcel  
of the freehold.

Glass, when used in windows, is parcel of the freehold, and if it be broken or carried away, it is according to Lord *Coke* (d), waste, for glass, he says, is part of the house. In Henry the Seventh's time, says Messrs. *Amos* and *Ferard* (e), it was held that glass should not be considered as belonging to the heir as parcel of the house, because it was not necessary to the house, which was perfect without it. *Swinburne* says, in his *Treatise on Wills* (f), that glass annexed to the windows of the houses is parcel of the inheritance, and does not go to the executor.

Granaries in  
some cases  
removable.

Although according to the before-mentioned rule of law, granaries may be reckoned as agricultural buildings, and of course, subject to the same rule of law as to dilapidations and waste, as to their annexation to the freehold. Yet Chief Baron *Eyre* (g) held at the Summer Assizes in 1724, that in Hampshire, a granary built on pillars is by the custom of the county a *chattel*, and, consequently, belongs to the tenant who erects it.

Obstruction of  
ancient lights  
to tenements.

In surveying dilapidations and other damage done to tenements, the architect is often called upon to remedy or inquire

(a) Barn. & Cress. vol. ii. p. 165.

(b) Pratt's Digest, p. 480.

(c) M'Clel. vol. vii. p. 217.

(d) Co. 1st Inst. p. 55 a.

(e) Page 80.

(f) Part vi. § 7. p. 758.

(g) Vin. Abr. vol. ii. p. 154. title  
*Executors*.

into the injury done to houses and other buildings by stopping up their lights.

The Roman lawyers made a difference between a window made for the purpose of light and air (*a*), or mere utility, or for prospect which united both pleasure and use. An action would not lie with the Romans for obstructing a mere prospect, except in defiance of the law of negative rights of owners of houses, which ordained (*b*), that no one should darken his neighbour's windows, nor hinder his neighbour's prospects by building or planting of trees; because they conceived the injuring a prospect to be no nuisance, a prospect being a matter of pleasure, and not of necessity. And why, they ask, may not a man build his house as high as he pleases, provided he does not injure the light of another man's house.

The Roman law as to such obstructions.

The laws of France as to windows (*c*), say that one of the neighbours cannot without the consent of the other, form in the particular wall any window or aperture, in any manner whatsoever; even a fan-light.

The laws of the French as to such obstructions.

676. The proprietor of a wall which is not common, joining immediately the estate of another, may form in such wall, lights or windows of wire-lattice and fan-lights. These windows, says this law, must be furnished with a lattice-work of iron, the meshes of which shall extend to an opening of one decimeter (about three inches eight lines) at the most, and with a dormant window.

677. These windows or lights must not be less than twenty-six decimeters (eight feet) above the floor or base of the

(a) "*Discrimen inter luminis et prospectus.*—Inter servitutes, ne luminibus officatur, et ne prospecto offendatur, aliud et aliud observatur: quod in prospectu plus quis habet, ne quid ei officatur ad gratiorem prospectum et liberum: in luminibus autem (non officere) ne lumina cujusquam obscuriora fiant: quodcumque igitur faciat ad lu-

minis impedimentum, prohiberi potest, si servitus debeat: opusque ei novum nunciari potest, si modo sic faciat, ut lumini noceat." Just. Dig. lib. viii. tit. II. leg. 15.

(b) Just. Inst. lib. ii. tit. III. § 1.

(c) Cod. Nap. § 3. title *Of Views over a Neighbour's Property*, law 675, et seq.

chamber which is desired to be lighted, if it be the ground floor; and nineteen decimeters (six feet) above the floor for the upper stories.

678. A party must not have direct views nor windows for sight, nor balconies or other similar projections over the estate, inclosed or uninclosed, of his neighbour, within the distance of nineteen decimeters (six feet) between the wall on which they are formed, and the aforesaid estate.

679. A party shall not have side or oblique views over the same estate, within the distance of six decimeters (two feet).

The laws of England as to such obstructions.

The laws of England on the obstruction of windows or ancient lights, are founded on a similar policy as those of the Romans and the French, and are peculiarly necessary to be understood by the architect.

Twenty years enjoyment of windows gives a right.

Lord *Kenyon* held in the case of *Cotterell v. Griffith* (a), in 1801, that an adverse enjoyment of windows for twenty years, or, as he said, *perhaps less*, is a sufficient title in defence of an action for obstruction. Similar decisions took place in the cases of *Darwin v. Upton* (b), and *Daniel v. North* (c).

And if stopped up twenty years, such right is lost.

And, by Lord *Ellenborough's* decision in the case of *Lawrence, widow v. Obee* (d), where an ancient window has been shut up for twenty-years, it loses its privilege. There was a similar decision in the case of *Lord Guernsey v. Rodbridges* (e).

Customs of the City of London as to ancient lights.

The following cases as to this very important subject, will, I trust, set the matter in a clear light to my architectural friends. That of *Plummer v. Bentham* (f), for obstructing his ancient lights, before Lord *Mansfield*, in the King's Bench, exhibits the custom of the City of London as to this sort of nuisance, in a very striking light.

(a) Esp. vol. iv. p. 69.

(b) Saund. vol. ii. p. 175 a, n.

(c) East's Rep. vol. ii. p. 372.

(d) Campb. Rep. vol. iii. p. 514.

(e) Com. Dig. temp. G.

(f) Burrow's Rep. p. 242.

The Recorder of London (Sir *William Moreton*) came to the bar, and CERTIFIED two *customs* of that City, ORE TENUS. Saturday, 12th  
February,  
1757.

Mr. *Williams* moved (when Sir *William Moreton* was down at the bar), that the Recorder of London might return two writs of *certiorari* directed to the Lord Mayor and Aldermen of London, to certify two of the customs of their City.

And then Mr. *Williams* opened the case, viz. That it was an action of trespass on the case brought by the plaintiff against the defendant, for *obstructing his ancient lights*, by a *new erection or building* which the defendant had raised against them. To which, the defendant had, (by leave) pleaded two justifications, both of them under the custom of the City of London. One of them was, that there is an ancient custom of the City of London, "That if any person has a messuage or house in the City of London, adjoining or contiguous to another MESSUAGE OR HOUSE, or to the ancient *foundations of one* in the said city, which former house has *ancient lights or windows* fronting, opposite to or over such other adjoining or contiguous MESSUAGE OR HOUSE or ancient *foundation of one*; such other person, owner of the LATTER messuage or house or ancient *foundation of one*, may well and lawfully exalt such his *messuage or house*, or rebuild upon the ancient *foundations* of such his adjacent or contiguous MESSUAGE OR HOUSE, any new *messuage or house*, to ANY HEIGHT that he shall please, against and opposite to the said ancient lights and windows of such first-mentioned neighbouring messuage or house to which his *messuage or house* or ancient foundations of a *messuage or house* are so contiguous or adjoining, and thereby darken and obscure such ancient lights and windows of such first-mentioned neighbouring house, having such ancient lights and windows; unless there has been some writing, instrument or record of an agreement or restriction to the contrary."

First plea, one of the above-named customs,

which allows houses built on ancient foundations to be carried to any height.

On this plea, issue was joined: and a *certiorari* issued, directed to the Mayor and Aldermen of the City of London, to certify "Whether they have or have not such a custom." Issue whether the city have such a custom.



Second plea,  
an extension of  
said custom.

The second plea, issue, and *certiorari*, were the same with the first, only with this difference or rather *extension* of the custom pleaded; viz. "That the owner of any ERECTION OR BUILDING or the ancient foundation of any ERECTION OR BUILDING, might well and lawfully exalt such ERECTION OR BUILDING, or erect and build thereon a new ERECTION OR BUILDING to any height that he pleases &c.;" and so on, as in the former plea: only that the former plea confined the claim of the privilege to *messuages or houses*, which this latter plea extends to *all erections or buildings*.

Recorder's  
certificate.

Sir *William Moreton*, Knight, Recorder of London, accordingly *certified* (a) *ORE TENUS*, by command of the Lord Mayor and Aldermen, (after having recited the pleadings and *certiorari*) "That there *is* such a custom as is alleged in the former plea. But that there is *no* such custom as is alleged in the latter plea."

The Lord  
Mayor's re-  
turn.

The Recorder then delivered in both the writs of *certiorari*, with written copies of the respective returns annexed, though he had delivered them *ore tenus* at the bar (which he told Sir *James Burrow* was usual). The returns were worded as follow, namely, "The execution of this writ appears in a certain certificate by us the Mayor and Aldermen of the said city of London, made by the Recorder of the said city at the day and place within contained, according to the custom of the said city, by word of mouth, as is within commanded.

Answer of the  
Mayor and  
Aldermen of  
London, as to  
the said cus-  
tom.

*The Answer of Marshe Dickinson, Esq. the Mayor, and of the Aldermen of the said City:—*

We, the said Mayor and Aldermen of the said city, by Sir *William Moreton*, Knt. Recorder of the said city, Do, in obedience to the said annexed writ, humbly certify, That there is now had, and from the time whereof the memory of man is not to the contrary, there hath been had and received such

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(a) See the first case in Sir H. Cal- was very like the present, and the de-  
thorpe's Reports ( well reported and termination agreeable to the certificate  
worth reading ) where the question as to this first plea.

ancient and laudable custom in the said city used and approved, to wit, "That if any one hath a messuage or house in the said city, near or contiguous and adjoining to *another ancient* MESSUAGE OR HOUSE, or to the ancient *foundation of another ancient* MESSUAGE OR HOUSE in the said city, of *another person his neighbour there*; and the windows or lights of *such messuage or house* are looking, fronting, or situate towards, upon, over, or against the said *other ancient* MESSUAGE OR HOUSE, or ancient *foundation* of such other ancient MESSUAGE OR HOUSE of such *other person his neighbour*, so being near, adjacent, contiguous, or adjoining, *although* such messuage or house, and the lights and windows thereof be or were *ancient*; YET such other *person his neighbour*, being the owner of such other MESSUAGE OR HOUSE, or ancient *foundations*, so being near, adjacent, or adjoining, by and according to the custom of the said city, in the same city for all the time aforesaid used and approved, *well and lawfully* may, might, and hath used, at his will and pleasure, his *said other* MESSUAGE OR HOUSE, so being near, adjacent, or adjoining, by building *to exalt or erect*; or, of new, upon the ancient *foundations* of such *other* MESSUAGE OR HOUSE, so being near, adjacent, or adjoining, *to build and erect a new messuage or house* to SUCH HEIGHT AS THE SAID OWNER SHALL PLEASE, *against and opposite* to the said *lights and windows* near or contiguous to such OTHER MESSUAGE OR HOUSE, and by means thereof TO OBSCURE AND DARKEN such windows or lights; unless there be or hath been some writing, instrument, or record of an agreement, or restriction, to the contrary thereof in that behalf."

Reciting the custom.

The return to the other writ of *certiorari* was in the same form, and to the very same effect as to the custom certified by the former, and repeated the return to the former *certiorari* *in totidem verbis* very nearly: but it went on further, with a *negation* of the existence of any such custom as the defendant had alleged in his *second* justification. The additional part was as follows:—

Return to the other writ.

And that in the said city of London there is NOT now or ever was any *such* custom, "That if any one hath a messuage or house in the said city, near or contiguous, and adjoining

to an ERECTION OR BUILDING, or to the ancient foundations of an ERECTION OR BUILDING in the said city, of another person his neighbour there; and the windows or lights of such messuage or house are looking, fronting, or situate towards, upon, over, or against such ERECTION OR BUILDING, or the ancient foundations of such ERECTION OR BUILDING of such other person his neighbour, so being near, adjacent, contiguous, or adjoining: although such messuage or house, and the lights and windows thereof be or were ancient, yet such other person his neighbour, being the owner of such ERECTION OR BUILDING, or *ancient* foundations of such ERECTION OR BUILDING, so being near, adjacent, or adjoining, by and according to the custom of the said city, in the same city for all the time aforesaid used and approved, well and lawfully may, might, and hath used, at his will and pleasure, his said ERECTION OR BUILDING, so being adjacent or adjoining, by building to *exalt and erect*; or, of new, upon the ancient foundations of the said ERECTION OR BUILDING, so being near, adjacent, or adjoining, to build and erect a *new erection or building* TO SUCH HEIGHT *as the owner shall please*, against and opposite to the said lights and windows of such messuage or house and by means thereof to obscure and darken such window or lights."

Decision of  
the Court.

The Court ordered the *certiorari* to be filed, and the *return* recorded.

Sir *James Burrow* adds as a note to this curious case, that nothing of this kind had actually happened for many years past (not even since Henry the Sixth's reign) in *this* Court (though it has in the Court of Chancery). And a consultation was had in the city concerning the sort of gown which it was proper for the Recorder to put on to make this *ore tenus* return: in which consultation it was determined, that it ought to be the purple cloth robe, faced with black velvet, and not his scarlet gown, his black silk one, nor the common bar gown (a).

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(a) See *Viner's Abridgment*, title "concerning this manner of trying the *Customs of London*, letter P. pla. 3 & 4, customs of London; and how to sur-

Another case, no less valuable and appurtenant to the nature of this work, is that of *Hughes v. Keymish* (a), tried in Trinity Term, 7th James 1. in the King's Bench, Rot. 1490.

This was a special action upon the case, brought by the plaintiff against the defendant for the erecting of a building in a yard, and on a void piece of ground, adjoining unto the plaintiff's house, and thereby stopping up three of his ancient (b) lights, by which he saith, that he is damnified to the value of 20*l*. The defendant by way of plea saith, that at the time of this building by him thus made, his dwelling-house was very ruinous, and in great decay, insomuch as that he was enforced to take down one side of it, and upon the same place for to erect a new building; and further shewed, that the city of London *est antiqua civitas*, and sets forth the custom of the city of London to be, that where an ancient house hath been, that there upon this old foundation by the said custom, he may build and stop the adjoining lights of another, and so justifies; and upon this plea and justification, in this manner pleaded, the plaintiff demurred in law.

A special action upon the case for stopping up of three lights &c.

Pleads the custom of the city of London.

*John Moore*, for the plaintiff, that this plea and justification thereby is not good, and that the plaintiff hath just cause to demur; the stopping up of ancient lights is a great nuisance and damage, for that the lights are as necessary as the house. It is here objected, that this justification is grounded upon the custom of the city, to build upon an ancient foundation. In answer unto this, the custom here is not well pleaded, and this custom itself, as it is alleged and set forth, is not good, the same being in itself altogether unreasonable. For to stop up the lights of another, by a new building, which lights are as necessary as his house. Also the defendant here hath not by way of allegation set forth the act of parliament for confirming of the customs; the plaintiff here hath set forth that

Objected.

Resp.

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wise" that they ought to be tried thus, country, as other issues in fact are."  
 "and not by the country." It is in (a) Bulst. Rep. part i. p. 115.  
 vol. vii. p. 246, note, "Without such (b) Yelv. 215. Co. Ent. 20. Calth. 1.  
 & surmise they shall be tried by the Godb. 183.

An ill usage  
to oust a man  
of his heritage.

Act of parlia-  
ment confirm-  
ing the custom  
of the city.

Trin. 29 Eliz.  
B. R. *Bland*  
and *Moseley's*  
case, cited  
*Coke*, 9 pla.  
fo. 50. in *Aldred's*  
case.

8 E. 4. fo. 18,  
19. 21 E. 4.  
fo. 28. Bro.  
tit. Custom,

time out of mind hath used to stop up these lights; also the custom, as it is here laid, is unreasonable, for a man cannot prescribe to take away my inheritance, and in the book of 43 E. 3. fo. 32, where an abbot being lord of the ville of C. said that the usages of the ville were such, that when the tenant did cesse by two years, that the lord may enter, and hold until the tenant do make agreement with him, as touching the averages, and laid, that he who was tenant had *cessed* for two years, by force whereof he as lord did enter, because the usage was only alleged for to be in this ville, and in no other. It was there held by *Knivet*, and the whole Court, that this was an ill usage to *oust* a man of his heritage. It was also further alleged, that the act of parliament for confirming the customs of the city of London is a private act, of which the Court here is not to take any notice, unless the same be specially alleged by the party, and so was it adjudged here in this Court. Trin. 29 Eliz. 2. between *Bland* and *Moseley*, cited *Coke*, 9 pla. fo. 26. in *Aldred's* case, concerning a custom laid to be in the city of York. As to the manner of the pleading here in bar, the same is not good; the plaintiff complains here of a damage to him done by the erecting of buildings in a yard, and upon a void piece of ground; the defendant by plea saith, that he had an old house, part of which was fallen down, and that there he did build the new, this is no sufficient answer to the plaintiff's declaration, nor yet to that of which the complaint is made, being for stopping of his ancient lights, for if one do charge another for words spoken in Middlesex, and he pleads, and justifies, as to words spoken in Essex, this is not good, so here in this case the defendant makes no answer at all to the plaintiff's declaration. *Stevens* agreed to the contrary for the defendant, that the plea and justification is good. A fisherman may prescribe to dig the land, and to fasten stakes to dry his nets, and this upon the soil and freehold of another; the reason is, because this is for the public good, and the other may also prescribe against this, for to have a certain benefit, or recompence given unto him for the same; this appeareth by the books of 8 E. 4. fo. 18, 19. 21 E. 4. fo. 28. 6 *Brook*, tit. *Custom*, pla. 51. 11 H. 7. fo. 25. 6 *Coke*, 9 a. pla. fo. 58. in *Bland* and *Moseley's*

case, cited in *Aldred's case*, where it is resolved, that if one hath a lawful easement or profit by prescription, another custom, which is likewise time out of mind, cannot take the first away, for that the one custom is as ancient as the other; and it was resolved in a case between *Hammond* and *Alsey*, Pasch. 34 Eliz. C. B. Rot. 275, that, by the custom, a man may build upon an old foundation, and so was the opinion of *Popham*, Chief Justice, B. R. that such a custom was good, and so was it adjudged here in this principal case, that this custom is good, but because the defendant here, in pleading of his justification, did not set forth by way of pleading, that he did erect this his new building upon the old foundation as he ought to have done; for this cause, and for this omission, by the opinion of the whole Court, the plea is not good, and so the defendant hath failed in his justification, and that the plaintiff had good cause for this omission to demur in law, and so by the rule of the Court judgment was given for the plaintiff.

pla. 51. 11 H. 7. fo. 25. Coke, 9 a. pla. fo. 58. in *Bland* and *Mosely's case*, cited in *Aldred's case*. *Hammond* and *Alsey's case*, 34 Eliz. C. B. Rot. 275.

Judgment for the plaintiff.

Another case of a similar nature was afterwards, in Michaelmas Term, 10th James 1, brought in the Court of King's Bench by *Newal v. Barnard* (a).

This was a special action on the case, that was brought by the plaintiff against the defendant, for stopping up three ancient lights, which had been there time out of mind; and that the defendant had stopped them up *totaliter ad damnum*. The defendant pleaded in bar, and thereby confessed the stopping of two of the lights and part of the third. He justified and afterwards took a traverse in this manner *absque hoc*, that he stopped up the three lights, *aliter vel alio modo*, and in this justification he shewed the Custom of LONDON to be this; namely, that any one may build upon an old foundation and upon his own land, the which he had done, and so he justified.

An action on the case for stopping up three lights. *Yelv. p. 225.*

Defendant justifies two of the stoppages by the custom of London,

As to the traverse, exception was taken, that this was no answer at all to the declaration, and Mr. Justice *Williams* and traverse to the other.

(a) Entered Pasch. 10 Jac. B. R. Rot. 597. Bustr. Rep. part i. p. 116.

Exceptions to the traverse.

said, that the plaintiff by this declaration had here laid to the defendant's charge, the stopping of three of his lights *totaliter* and for which he brought his action, and the plaintiff's traverse as it was there taken, with an *absque hoc*, was no answer at all to this declaration; but he ought to have answered, *guilty* or *not guilty*, as to the residue, and so he ought to have pleaded, without taking of any traverse at all. For where there are three wrongs laid to be done, as in this case, and the defendant makes answer to only two of them, and says nothing at all to the third; this is no good answer, and so it is in this case; the plaintiff's plea being that he had stopped two of the plaintiff's lights *totaliter*, and this he had justified by the custom of the *City of London*, by building upon an old foundation, and the third in part, with a traverse taken, *absque hoc, quod aliter vel alio modo*, the *absque hoc*, said the learned Judge, here went to the second lights before mentioned, and as to the third in part, this was no answer at all; for that the plaintiff ought to have pleaded *not guilty* as to the residue, and not have taken a traverse. As to this, he said, "We know your meaning, by your saying; as to part of the third, this is no good pleading; but you ought, as to this third part to have pleaded *not guilty*, and therefore for this default in pleading, judgment was given by the Court for the plaintiff."

Judgment given for the plaintiff.

One purchases a house and another the land, the latter cannot stop the lights of the former.

Another case in point is that of *Palmer v. Fletcher* (a), wherein it was decided, that if a man build a new house on part of his lands, and after sold the house to one, and the lands to another, the latter cannot obstruct the lights of the former.

This was an action on the case brought by the plaintiff against the defendant for stopping of his lights. The case was, a man erected a house on his own lands, and after sold the house to one, and the lands adjoining to another, who by putting piles of timber on the land, obstructed the lights of

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(a) Lev. Rep. part i. p. 122.

the house: and it was resolved, that although it be a new messuage, yet no person who claims the land by purchase under the builder, can obstruct the lights any more than the builder himself could, who cannot derogate from his own grant, by *Twysden* and *Wyndham*, Justices, *Hyde* being absent, and *Kelynge* doubting. For the lights are a necessary and essential part of the house. And *Kelynge* said, "Suppose the land had been sold first, and the house after, the vendee of the land might stop the lights." *Twysden*, to the contrary, said, "Whether the land be sold first or afterward, the vendee of the land cannot stop the lights of the house in the hands of the vendor or his assignees; and cited a case to be so adjudged;" but all agreed, That a stranger having lands adjoining to a messuage newly erected, may stop the lights; for the building of any man on his lands cannot hinder his neighbour from doing what he will with his own lands; otherwise if the messuage be ancient, so that he has gained a right in the lights by prescription; and afterwards, in Mich. 16 Car. 2. B. R. a like judgment was given between the same parties for erecting a building on another part of the lands purchased, whereby the lights of another new messuage were obstructed.

Lights are a necessary and essential part of a house.

In an action for ancient lights, *Dougal v. Wilson* (a), tried before the Court of Common Pleas, Trinity Term, 9 Geo. 3. the defendant attempted to shew that the lights did not exist more than sixty years; and Chief Justice *Wilmot* said, that if a man had been in possession of a house with lights, belonging to it for fifty or sixty years, no man could stop up these lights. "Possession for such a length of time," he said, "amounted to a grant of the liberty of making them; it is an evidence of an agreement to make them. If I am in possession of an estate for so long a period as sixty years, I cannot be disturbed even by a writ of right, the highest writ in the law. If my possession of the house cannot be disturbed, shall I be disturbed in my lights? It would be absurd. But the action can only be maintained for damages so far as the lights originally

Chief Justice Wilmot's opinion, on ancient lights.

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(a) Saund. Rep. vol. iiii. p. 175 a.



Twenty years enjoyment of lights sufficient to give a right.

extended, and not for an increase of light by enlarging the windows recently; and I should think a much shorter time than sixty years might be sufficient; but here has been a possession of that time." So in *Lewis v. Price (a)*, tried at the Worcester Spring Assizes in 1761, which was an action on the case for stopping and obstructing the plaintiff's lights, the same learned Judge said, that where a house has been built forty years, and has lights at the end of it, if the owner of the adjoining ground builds against them so as to obstruct them an action lies; and this is founded on the same reason as when they have been immemorial, for this is long enough to induce a presumption that there was originally *some agreement* between the parties; and he said that *twenty years* is sufficient to give a man a title in ejectment, on which he may recover the house itself; and he saw no reason why it should not be sufficient to entitle him to any easement belonging to the house.

Where an ancient window is enlarged and heightened, the owner of the adjoining premises is not at liberty to cover any part of the space occupied by the original window, though the unobstructed part of the new window be larger than the old window, and though the party have no other means of reducing the window to its former size, as was held in the case of *Chandler v. Thompson*, tried before Lord *Ellenborough*, in 1811.

Windows of manufactories &c.

Where the injury complained of is the erection of a wall, whereby the plaintiff's window is generally darkened, and the window is that of a malt house or other manufactory, and the light admitted is sufficient for the original purpose, the action cannot be maintained. It was so decided in the case of *Martin and Another v. Goble*, if a building after having used for twenty years as a malt-house, is converted into a dwelling-house; in its new state it is entitled only to the same degree of light, which was necessary to it in its former state, and the owner of the adjoining ground may lawfully erect a

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(d) *Saund. Rep.* vol. iii. p. 175 a.

wall which prevents the admission of sufficient light for domestic purposes, if what is still admitted would be enough for the making of malt.

It appeared in this instance that the building in question which had stood between thirty and forty years, and had been formerly used as a malt-house, was conveyed to the plaintiffs about seven years before for the use of the inhabitants of the parish of Bosham, near Chichester in the county of Sussex, by whom it was converted into a parish workhouse; and that since that time it had been inhabited by the paupers belonging to the parish, and a person appointed by the parish officers to take care of them, under the name of the Governor of the Workhouse.

Serjeant (now Chief Justice) *Best*, contended, on behalf of the defendant, that the evidence falsified the averment in the declaration, that when the grievances supposed to be committed, the house was in the possession and occupation of a tenant or tenants under the plaintiffs. He argued that neither the master of the workhouse nor the paupers could be considered as tenants to the plaintiffs. They had no estate or interest in the house; they had no power or controul over it; they were put in and could be removed at the pleasure of the parish officers, and were no more tenants of this building than a gentleman's porter is of the lodge at his master's gate, and that this was a fatal variance between the declaration and the evidence.

Serjeant *Shepherd*, on the contrary, insisted that the paupers and the master of the workhouse were tenants and occupiers sufficiently to answer the averment in the declaration.

The Chief Baron, Sir ARCHIBALD MACDONALD, who tried the cause, said, that the relation of landlord and tenant certainly did not subsist between the plaintiffs and the inhabitants of this workhouse. The cripples in St. George's Hospital might as well be considered tenants of that building, or the head nurse or turnkey of a madhouse tenants of the cells in

which the lunatics are confined. Therefore the house was not in the possession or occupation of any tenant or tenants thereof under the plaintiffs, he ruled, that the declaration, as to all but the second count could not be supported.

This second count is much to our purpose, for after stating the plaintiff's seisin in fee, without mentioning who was in possession of the house, went on to allege the grievance of stopping up the lights in the usual form, and complained that the plaintiffs were greatly injured and prejudiced in their *hereditary* estate and interest of and in the said last-mentioned dwelling house.

The evidence as to the effect produced by a fence, that the defendant had lately erected near the workhouse was extremely contradictory. Some of the witnesses swore that scarcely any light could be admitted through the windows; and others, that the house was, at any rate, as well supplied with light as it had formerly been when used for the purpose of making malt, though not perhaps sufficient for all domestic purposes.

Chief Baron  
Macdonald's  
opinion of  
stopping an-  
cient lights.

Sir ARCHIBALD MACDONALD said, it was not enough that the windows were to a certain degree darkened by this wall, which the defendant had erected on his own ground. The house was entitled to the degree of light necessary for a malt house, not for a dwelling house. The converting it into the other could not affect the rights of the owners of the adjoining ground. No man could, by any act of his, suddenly impose a new restriction upon his neighbour. This house had for twenty years enjoyed light sufficient for a malt house, and up to this extent and no farther, the plaintiffs could still require that light should be admitted to it. The question therefore was, whether, if it still remained in the condition of a malt house, its proper degree of light for the purpose of making malt was now prevented from entering it by reason of the wall which the defendant had erected.

Verdict for  
defendant.

The jury found a verdict for the defendant.

A similar case was determined by Lord Hardwicke, when Lord Chancellor, in 1740, in the case of the *East India Com*

*pany v. Vincent (a)*, wherein his Lordship said, there were several instances, when a man had suffered another to go on with building upon his ground, and had not set up a right till afterwards, when he was all the time cognisant of his right; and the person so building not having had notice of the other's right; the Court of Chancery would oblige the owner of the ground to permit the person building to enjoy it quietly, and without disturbance.

A man suffering another to build wrongfully, cannot compel alteration afterwards.

But these cases, said his Lordship, have never extended so far as where parties have treated upon an agreement for building, and the owner has not come to an absolute agreement. In such cases if persons will build notwithstanding, they must take the consequence, and this is not such an acquiescence on the part of the owner, as will prevent him from insisting on his right.

He farther said, that if he should give an opinion that lengthening of windows, or making more lights in the old wall than there were formerly, would vary the rights of persons, it might create innumerable disputes in populous cities, especially in London, and therefore he would not give an absolute opinion, but he rather thought it did not vary the right.

Lengthening of windows, or making more lights in the old wall than formerly, does not vary the rights of persons.

In this case it appeared, that the defendant *Vincent* was a partner to the *East India Company*, and Lord *Hardwicke*, in giving his judgment on it, said, where an agent of the *East India Company* is in treaty with an owner of ground, for a liberty for the Company to build, and the owner at the time of the treaty, in consideration of his consent, insists upon terms, to which the agent makes no answer or objection, but immediately afterwards the Company think proper to build, the silence of the agent shall be construed as an acquiescence under the proposal of the owner of the ground, and will bind the Company his principals, as being, in the consideration of the Court of Chancery, the agreement of the agent.

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(a) Atk. Ch. Rep. vol. ii. p. 83. Case 81.

He was also of opinion, that notwithstanding the Company's dismissing Mr. *Vincent* from their service as a packer, contrary to their agreement between him and the agent of the Company, yet he was not justified in building a wall merely to block up the lights, but he might have brought his bill into the Court of Chancery, to establish the agreement between him and the Company's agent as a compensation for consenting to the Company's building upon his ground.

Lord Hard-  
wicke's decree.

Upon this therefore, his Lordship decreed that the wall erected by the defendant was to be pulled down; but directed in his favour, that the Company was to employ him double to any other packer, during his term in the estate, provided he did it at the same rates that people of the same trade would do.

Injunction to  
restrain stop-  
ping a light,  
not ancient,  
refused.

In the case of *The Fishmongers' Company v. The East India Company* (a), Lord Hardwicke, when Chancellor, refused an injunction prayed for by the plaintiffs, who moved the Court of Chancery, to order, that the brick wall which had been built by the defendants, close to the wall of the yard or terrace belonging to a house of the plaintiffs in Fenchurch Street, so far as the same obstructed, darkened or obscured the plaintiffs' ancient window lights might be taken down and removed.

The counsel for the plaintiffs proposed a trial, in order to show what damage it would be to have the intended erection carried higher than their house; but the defendants' counsel declined it, insisting that as there was a space of seventeen feet between the plaintiffs' house and their buildings, it could not be considered as a nuisance, there being many streets and lanes in London not so wide, though they admitted it might in some measure obscure the plaintiffs' lights; and they also contended for a right to build on their own ground.

Lord Hard-  
wicke's decree.

Lord Hardwicke in pronouncing his decree was of opinion, that the building complained of was not a nuisance contrary to law; for it is not sufficient to say, that it will alter the plain-

(a) Dick. Ch. Rep. vol. i. p. 163.

lights, for then no vacant piece of ground could be built upon in the city; and in this case there will be seventeen feet distance, and the law says, it must be so near as to be a nuisance. It is true the value of the plaintiffs' house may be reduced by rendering the prospect less pleasant, but that is no reason to hinder a man from building on his own ground.

Lord Coke says in his Reports (a), if a man has an ancient house, and another builds so near to him that he deprives him of the benefit of light and air, by darkening his windows, an action will lie against the wrong-doer.

Lord Coke's opinion on ancient lights.

But to maintain this action, he says, the house must be an ancient house; that is, have stood there time immemorial (b); for if two men have land adjoining, and one builds a house on his own land, and makes his windows look into his neighbour's land, though his house may have stood thirty or forty years, yet may his neighbour build an house on his own land, and obstruct the other's lights; for *cujus est solum ejus est usque ad cælum*, and it was folly in the first person to build so near the land of another.

Rule of law as to.

But if a man builds an house upon any part of his own land, and afterwards sells that house to another, neither the vendor nor any person claiming under him shall be allowed by any pretence to stop the lights, for no man shall be allowed to do any injury in derogation of his own grant (c).

But, says Lord Coke (d), where a man has such ancient lights, and so prescribes to have his lights uninterrupted, to the contrary prescription to stop the lights shall be alleged against it; for each being supposed to have existed from time immemorial, the latter cannot be deemed more ancient than the former.

(a) Co. Rep. vol. ix. fo. 58.

(c) See the before quoted case of Palmer v. Fletcher, ante, p. 189.

(b) Bury v. Pope, Cro. Rep. Eliz. fo. 118.

(d) Co. Rep. vol. ix. fo. 58 b.

A house near a street is entitled to the privilege of ancient messuage.

It appears, from the case of *Leader v. Moxon and another* (a), that where a man builds his house *near a street*, he is entitled to all the privileges of an ancient messuage, and can construct his windows accordingly. For this action was adjudged to lie against the commissioners for paving, for raising the street so high as to obstruct the plaintiff's lights and windows. For the ground of the street being appropriated to the public, excludes the above-named idea of *folly* in building near the ground of another, and close to the street is the most proper situation.

But raising a wall to obstruct a mere *prospect* (b), or in any way to prevent it, is not actionable, for it only deprives the party of a matter of pleasure, and abridges him of nothing either useful or necessary.

Damages paid, does not abate a nuisance.

In the case of *Westborn v. Mordaunt* (c), it was held by the Court, that a recovery of damages in an action of this nature does not discharge the nuisance; for every continuation of it subjects the offender to a new action, and therefore a person may recover damages for a nuisance to an house which commenced before he came into possession, if it existed when he entered.

Therefore, as it appeared in the case of *Rosewell v. Prior* (d), where the plaintiff recovered damages against the defendant for a nuisance to his house, and the defendant afterwards underlet it, and the action was brought for a continuance of the nuisance after the granting of the under-lease. The action was therefore held to lie, for as he was before liable to an action for the continuance, he should not discharge himself by his own act of underletting, and as he had a rent in consideration of the continuance, he was bound to answer for the damages it occasioned.

(a) Serjt. Wils. Rep. vol. iii. p. 461.  
Blackst. Rep. vol. ii. p. 924.

(b) Co. Rep. vol. ix. p. 58.

(c) Cro. Rep. Eliz. fo. 191. Leon.  
Rep. vol. ii. p. 103.

(d) Salk. p. 460.

So also may an action of trespass on the case be maintained against the assignee for a continuance of the nuisance, as was held in the case of *Rippon v. Bowles* (a), but with this distinction, that where the whole mischief has been done to the plaintiff by the first erection, there the action will not lie against the assignee; but where the continuance occasions a new nuisance, the assignee is liable.

An action may be brought against an assignee for such a nuisance.

An action of trespass on the case may be maintained by a lessee for years, as shewn in the case of *Symonds v. Seybourne* (b), for obstructing the lights of an ancient messuage, grounded on the prescription, notwithstanding the weakness of his estate, for the prescription is *to the house, not to the person*.

Lessee for years may bring an action for such a nuisance.

So also may he in *reversion* as well as he in *possession*, maintain an action for a nuisance, by obstructing the lights; for it is an injury to the inheritance as well as to the present enjoyment, and each party may have his own action. This was held in the case of *Jeffer v. Giffard* (c).

So also may a reversioner.

If a tenant in possession refuses to let the owner or his surveyor enter his tenement to view the state of repairs, he is liable to an action. And even an action was adjudged in the case of *Hunt v. Downman* (d), to lie against the defendant, who was lessee for years, for preventing the plaintiff, who had but the *reversion* in fee, from coming on the lands to see if there had been any waste committed, and this, though it was not shewn that any waste had been committed.

Tenants preventing surveys of repairs, how punishable.

In the case of *Kirby v. Sadgrove* (e), the excellent legal doctrines were held concerning the obstruction of windows and similar nuisances, that are most worthy the architect's closest attention.

The law as to obstructions &c.

(a) Cro. Rep. Jac. p. 373.

(d) Cro. Rep. Jac. p. 478.

(b) Cro. Rep. Car. p. 324.

(e) Bos. & Pul. vol. i. p. 14.

(c) Burr. Rep. vol. iv. p. 2141.



*The statute of Merton*, 20 Hen. 3. c. 4, *the statute of Westminster* 2, 13 Edw. 1. c. 46, and 3 & 4 Edw. 6. c. 3, establish three rights; *ingress, egress* and a *sufficiency of common* when on the common. It is allowed, says Serjeant *Shepherd* in this case, that if the lord plant a hedge or build a wall, so as totally to exclude a commoner from the exercise of his right, he may abate the nuisance. The reason is given by Lord *Mansfield* in *Cooper v. Marshall* (a), because every such obstruction is directly contrary to the terms of the grant; a hedge, a gate or a wall to keep the commoner's cattle out, is inconsistent with the grant which gives them a right to come in.

The term "nuisance," says Serjeant *Shepherd*, in the same case, is not applicable to the mode of doing the thing, but to the thing done, and its effects on another.

Obstruction  
of windows.

If the lights of a house be obstructed, so that the possessor is prevented from enjoying *in tam amplo modo*, he may abate what causes the obstruction (b); thus in *Rex v. Pappin* (c), which was an indictment for a nuisance, Lord Chief Justice

A house built  
too high, so as  
to obstruct  
windows.

*Raymond* said, "You cannot destroy the whole, but only so much of a thing as makes it a nuisance. Suppose a man builds his house up so high as to be a nuisance to his neighbour, by obstructing his lights, or in any other respect arising from its *excess*, you must not destroy the whole house, but only so much of it as by its excess above what is allowable, constitutes the nuisance." And in this opinion Mr. Justice *Foster* coincided.

Water mills.

In the case of a water-mill, the owner of the mill having a right to the water of a water-course, may, if the water be stopped in another's lands, enter those lands and remove the

Ways stopped.

dam. So if a way be stopped, he who has the right of way, may abate the stoppage, whether it be total or partial. Chief Justice *Eyre* said, there was a distinction taken in *Fitz-*

(a) Burr. p. 265.

(c) Strange Rep. vol. i. p. 682.

.5 Sir William Jones, p. 222.

*herbert (a)*, "if a way be so stopped, that the party can pass but narrowly, an action on the case will lie; but if it be wholly stopped, an assize" (*b*).

Concerning the right to ancient lights, Sir *William Blackstone (c)* says, "If I have an ancient window overlooking my neighbour's ground, he may not erect any blind to obstruct the light; but if I build my house close to his wall, which darkens it, I cannot compel him to demolish his wall; for there the first occupancy is rather in him than in me."

*Blackstone's opinion on ancient lights.*

When an architect is employed to survey the dilapidations that have been committed or suffered to accrue in any certain tenement or other property, he should carefully peruse the lease, and extract the leading covenants and other provisoes, by which the tenant is bound, into his measuring book, and make therefrom a schedule of such parts of the demised premises as are liable thereto. He should enter them into proper columns, distinguishing the complete repairs from the mere dilapidations. A few of these, which are actual surveys, and have been settled at the sums therein mentioned, are given in the Appendix (*d*), as well as sundry notices to repair under covenants &c.; and a case of dilapidations done whilst over holding, after a notice to quit (*e*), which is worth attention.

*Manner of taking accounts &c. of dilapidations in the measuring book.*

(a) *Fidd. Nat. Brev.* p. 193, n.

(b) *4 Hen. 4. c. 31.*

(c) *Blackst. Com.* book ii. c. 26.

(d) *Vide Appendix, Nos. XXIX. to XXXVI.*

(e) *Appendix, No. XXXV.*

## CHAPTER III.

### FIRES, PARTY WALLS AND THE BUILDING ACT.

ON FIRES.—*Laws of the Romans thereon.—Laws of the French.—Lord Coke's opinion thereon.—Damage by Fire. By whom to be repaired.—Statute of Gloucester and subsequent Laws thereon.—Cases and Illustrations.*—ON PARTY WALLS.—*Who to repair or re-build.—Under the Building Act and in common Cases.—Law of, as to Lessors and Lessees.—Opinions and illustrative Cases.*—ON THE BUILDING ACT.—*Lord Kenyon's, Lord Chief Justice Eyre's, Justice Grose's, Baron Wood's and other judicial opinions thereon.—Cases cited and referred to.*

Damage by fire a species of dilapidation.

**D**AMAGE BY FIRE is a species of *dilapidation*, that is to be re-instated, according to circumstances; which circumstances, it is the architect's duty to make himself acquainted with, when he is called in under such a calamity.

The Roman law as to fire.

The laws of the Romans concerning damage done by fire, as promulgated by *Justinian*, are like the majority of that celebrated code, founded on the purest equity, and are entitled to our greatest admiration. With them, according to that celebrated legislator (*a*), a fault is not presumed, but ought to be proved by him who alleges the same; and this is true, whether the fault be of omission or commission. For in a doubtful case, that interpretation ought always to prevail, which excludes and bars the presumption of a fault; and, therefore, a person is presumed to have done that in another concern, which, according to *Angelus* (*b*), he is wont to do in his own. So that an administrator was by them presumed to

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(*a*) Just. Dig. lib. xlviii. tit. 3. leg. 14. § 2. Also the Gloss on the 18th § 1. Law of the Digest, lib. 23. tit. 3. § 1.

(*b*) Ang. in leg. 9. Dig. lib. xv. tit. 1.

have done that in another man's business, which he is wont to do in his own. Yet, by the Roman law, fire was presumed to happen through the fault of the tenants or inhabitants of a house, unless the tenant could prove that it happened without his fault, or the fault of his family, for whom he is liable. But though a fire be presumed to have its rise from the fault of its inhabitants, yet such a fault was presumed to be a fault only of the lightest nature: and therefore, since a tenant was not answerable for such a fault, but only, as the Roman lawyers termed it, *de dolo* (a) and *de latâ* (b) *et levi culpa*, he may excuse himself from the damage which happens by fire to the house which he rents and he shall not be answerable for any damage. For a fault of a tenant in respect of fire, in order to make him liable, ought to be a fault of commission: and, otherwise, a tenant liable on the account of fire, is not so even by the Aquilian law, although that law comprehends even the lightest fault. By the law of the Twelve Tables, a person by whose negligence any fire began, was bound to pay double to the sufferers; or if not able to pay, to suffer a corporal punishment.

The French laws, as shewn by the *Code Napoleon*, in relation to damage done by fire to tenements, say, in a similar spirit (c), that the lessor is responsible for deteriorations or losses which happen during his enjoyment, unless he can prove

Laws of the French relating to damage by fire.

(a) *Dolus* or deceit, is one of the species in the Roman law, of the genus fault, which according to their lawyers, had its rise from a malicious purpose of mind, which acting in contempt of all honesty and prudence, had a full intent to do mischief or an injury. Thus they wisely distinguished a fault from a fortuitous case.

(b) A *lata culpa*, in the Roman law, is that which is occasioned by gross sloth, rashness, improvidence and want of advice; denoting a negligence that is not tempered with any kind of dili-

gence. The other, *levis*, imports such a kind of negligence, whereby a person does not employ that care in men's affairs which other men are wont to do, though he be not more diligent in his own business. But Dr. Ayliffe says, that as often as the word *culpa* is simply used in the law, it is taken for that which they styled *culpa levis*, a light fault, because words are ever understood in the more favourable sense. Ayl. Pand. book ii. tit. 13. Just. Dig. lib. 1. tit. 17. leg. 24.

(c) Cod. Nap. law 1732.

that they occurred without his fault. Also (a) he is answerable in case of fire, unless he can prove that the fire happened by accident or superior force, or by faulty construction, or that the fire was communicated from a neighbouring house.

Law of England relating to damage by fire.

The malicious and wilful burning of the house, tenement or out-house of any man, is called by the law of England *arson*; from *ardendo*, to burn (b). Blackstone says it is an offence of very great malignity, and much more pernicious than simple theft: because, first, it is an offence against that right of habitation, which is acquired by the laws of society; next, because of the terror and confusion that necessarily attends it; and lastly, because in simple theft, the thing stolen only changes its master, but still remains *in being*, for the benefit of the public; whereas by burning, the very substance is absolutely destroyed. It is also, says the same learned writer, frequently more destructive than murder itself, of which it too often is the cause; since murder, atrocious as it is, seldom extends beyond the felonious act designed; whereas fire too frequently involves in the common calamity, persons unknown to the incendiary, and not intended to be hurt by him, and friends as well as enemies. For which reason the civil law, as before mentioned in the allusion to the laws of the Romans, when the civil code is drawn, punishes with death such as maliciously set fire to houses in towns, and contiguous to others; but is more merciful to such as only fire a cottage or house standing by itself.

Our English law also distinguishes, with much accuracy, upon this crime. Not only, says our before quoted authority (c), but all the out-houses that are parcel thereof, though not contiguous thereto, nor under the same roof, as barns and stables, says Sir *Matthew Hale* (d), may be the subject of *arson*, and are protected by the laws against this offence.

(b) Cod. Nap. law 1732.

(c) Blackst. Com. book iv. c. 16.

(d) Blackst. Com. book iv. c. 16.

(d) Hale's Pleas of the Crown, 567.

The offence of *arson*, says *Blackstone* (a), strictly so called, may be committed by wilfully setting fire to one's own house, provided one's neighbour's house is thereby also burnt; but if no mischief is done but to one's own, it does not, says that able lawyer, amount to felony, though the fire was kindled with intent to burn another's. But now, by the stat. 43 Geo. 3. c. 58, wilfully and maliciously setting fire to any house, granary, malt-house, mill, coach-house, stable, out-house, warehouse or shop, whether it be in the party's *own* possession, or in the possession of another, is felony without benefit of clergy.

By the common law, a wilful firing of one's *own* house, ~~is a~~ <sup>The common law as to fire,</sup> ~~town,~~ is a high misdemeanor, and punishable as such; and if a landlord or reversioner sets fire to his own house, of which another is in possession under a lease from himself, or from those whose estate he hath, it shall, says Sir *Michael Foster* (b), be accounted *arson*; for, during the lease, the house is the property of the tenant. By statute 6 Anne, c. 31, any servant negligently setting fire to a house or out-house, shall forfeit 100*l.* or be sent to the house of correction for eighteen months, in the same manner as the Roman law (c) directs, "*eos, qui negligenter ignes apud se habuerint, fustibus vel flagellis cædi.*"

The punishment for this offence, by our ancient Saxon laws, <sup>Our ancient laws as to fire.</sup> according to *Lambard* (d), was death; and, in the reign of Edward the First, this sentence, says *Britton* (e), was executed by a kind of *lex talionis*; for the incendiaries were *burnt* to death; as they were also by the Gothic Constitutions (f). The statute of 8 Hen. 6. c. 6, made the wilful burning of houses, under some special circumstances therein mentioned, amount to the crime of high treason; but it was again reduced to felony by the general acts of Edward 6, and Queen Mary; and now, says Sir *William Blackstone* (g), the punishment of all capital felonies is uniform, namely, by hanging.

(a) Blackst. Com. book iv. c. 16.

(d) Lamb. Archæionomia, c. 7.

(b) Foster's Pleas of the Crown, p. 115.

(e) Britt. Pleas of the Crown, c. 9.

(c) Just. Dig. lib. i. tit. 15. leg. 4.

(f) Stiernh. de jure Goth. l. 3. c. 6.

(g) Blackst. Com. book iv. c. 16.

This offence was denied the benefit of clergy by the statute of the 23 Hen. 8. c. 1, but that statute was repealed by that of the 1 Edw. 6. c. 12, and arson was afterwards held to be deprived of this benefit, with respect to the principal offender, only by inference and deduction, says *Blackstone* (a), from the statute of the 4 and 5 Philip & Mary, c. 4, which expressly denied it to the accessory before the fact, and is cited by Lord *Coke* (b), in the eleventh part of his Reports, in the case of *Alexander Powlter*, "who," as that eminent Judge says (c), "most wickedly and feloniously burnt the good town of Newmarket, and upon consideration of many intricate and ill-penned statutes, in the end clearly (as you will perceive) ousted of his clergy: wherein many notable and observable points concerning clergy, which by a mean concern the life of man." This case was determined in Trinity Term of the 12th year of King James the First. The benefit of clergy is now, says *Blackstone* (d), expressly denied to the principal in all cases within the statute of the 9 Geo. 1. c. 22.

A master is liable for damage by fire, done by his servant.

By the maxim of Lord *Coke* (e), *nam qui facit per alium facit per se*, and by the common law maxim (f), that a master is liable for the acts of his servant, and for any damage he does by his negligence; if a servant keeps his master's fire negligently, so that his neighbour's house was thereby burned down, an action would lie against the master, because this negligence happened in his service; but otherwise, says Sir *William Blackstone* (g), if the servant, going along the street with a torch, by negligence sets fire to a house, for in such case he is not in his master's immediate service, and must himself answer the damage personally.

(a) Blackst. Com. book iv. c. 16.

(b) Co. Rep. part xi. fo. 35.

(c) "Casum Alexandri Powlter qui sceleratissimè et felonice oppidum illud lautum Newmarket incendebat; qui post considerationem variorum statutorum perplexorum et male compositorum tandem (ut observes) à beneficio clericatus penitus fuit exclusus:

quo etiam multa imprimis notanda de clericatu, ad vitam hominis quodam modo spectantia determinantur."

(d) Blackst. Com. book iv. c. 16.

(e) Co. 4th Inst. p. 109.

(f) Doctor & Student, Dialogue 2. c. 42. Noy's Maxims, c. 44.

(g) Blackst. Com. book i. c. 14.

But now the common law is, in the former case altered by the statute of the 6 Anne, c. 31, which ordains that no action shall be maintained against any person, in whose house or chamber any fire shall actually begin; for their own loss, says *Blackstone* (a), is sufficient punishment for their own or their servant's carelessness. But if such loss, he continues, happens through the negligence of any servant, whose loss in such case is generally very little, such servant shall forfeit 100*l.*, to be distributed among the sufferers, and in default of payment, shall be committed to some workhouse, and there kept to hard labour for eighteen months. This also agrees with the Roman civil law (b), which holds that the "*pater familias*" in this and similar cases, "*ob alterius culpam tenetur, sive servi, sive liberi.*"

The common law in such cases, altered by statute.

Burning of houses was reckoned among unpardonable felonies by the laws of our Anglo-Saxon ancestors (c). So heinous was this offence, says Lord Coke (d), that in Anno, 3 Edw. 1, it was declared by parliament *Que ceux queux sont prises par arson soient en ascun manner replevisables. Adjudicantur suspendi, qui ex malitia præcogitata combusserunt magnam partem de Lynne in Com. Norff.*

Burning of houses, says Lord Coke (e), by negligence or mischance, is waste. By the common law, lessees were not answerable to their landlords for accidental or negligent burning of their tenements; but the Statute of Gloucester, by making *tenants for life* and *for term of years*, liable to waste without any exception, rendered them answerable for destruction by fire. But now, says Mr. *Hargrave* in his notes to Lord Coke's *First Institute* (f), by the 6 Anne, c. 31, (before cited) no action will lie against the tenant for such an accident. This statute, which was at first temporary, but is now made per-

Lord Coke's opinion on damage by fire.

(a) Blackst. Com. book i. c. 14.

burning) numeratur inter scelera inexpiabilia."

(b) Just. Dig. lib. ix. tit. 3. leg. 1.

(d) Co. 3d Inst. c. 15.

and Inst. lib. iv. tit. 5. leg. 1.

(c) "De incendiariis inter leges."

(e) Co. 1st Inst. fo. 53 a. Thomas's edit. vol. iii. p. 235.

Æthelstani, c. vi. fo. 61, et Canuti, c. lxi. fo. 118. "*Husbarnet* (house-

(f) Ibid.



manent, enacts, that no action shall be prosecuted against any person, in whose house any fire shall *accidentally* begin, with the proviso that the act shall not defeat any agreement between landlord and tenant.

Who are to repair damages by fire.

Where a party has by his own contract imposed on himself a duty or charge, he is bound to make it good, notwithstanding inevitable accident, because, as is laid down in the cases of *Paradise v. Jane* (a), and *The Brecknock &c. Navigation Company v. Pritchard* (b), he might have provided against it by his own contract. It is upon this principle, says Mr. J. H. Thomas in a note to his beautiful Systematic Arrangement of Lord Coke's *First Institute* (c), that it has been decided, that a lessee of a house, who covenants to pay rent and to repair, with an express exception of casualties by fire, is liable upon the covenant for rent, though the house is burned down and not rebuilt by the lessor after notice. This doctrine, which it behoves the architect to make himself acquainted with, is laid down in the cases of *Monk v. Cooper* (d), *Belfour v. Weston* (e), *Doe on the demise of Ellis v. Sandham* (f). These cases do not contain any thing to render them worthy of extracting into this Treatise, being only on a point of law to which a reference is sufficient. Neither, says Mr. Thomas in the same note, will a Court of Equity in such case interfere to restrain an action under the contract for payment of rent, which renders care in such cases the more necessary. The cases of *Hare v. Grove* (g), and *Holtzapffel v. Baker* (h), are cited in corroboration. But *Woodfall* (i) cites a case from *Ambler's Chancery Reports* (k), without naming it, in which he says the lessee of a house and wharf covenanted to repair, *accidents by fire excepted*; the house was burned down, and the lessor having received the insurance money, but neglected

(a) Dyer's Rep. fo. 33 a.

(b) Term Rep. vol. vi. p. 750.

(c) Vol. i. p. 469, note (G 1).

(d) Lord Raym. Rep. vol. ii. p. 1477.

(e) Term Rep. vol. i. p. 310.

(f) *Ib.* p. 705, and *ib.* vol. vi. p. 751.

(g) Anstruther's Exchequer Reports, vol. iii. p. 687.

(h) Vcs. Rep. vol. xviii. p. 115.

(i) Chap. x. § 2.

(k) Page 620.

to rebuild, and brought an action at law for his rent; a bill for an injunction till the house was rebuilt was held proper. Therefore in similar cases, an injunction from the Court of Chancery is a proper remedy.

If the covenant to repair be general, damage or dilapidations occasioned by fire must be re-instated or paid for by the lessee of a tenement, although it be destroyed by accident, as he mostly covenants with the lessor to repair if it be burned by accidental fire. So, also, if the premises be consumed by lightning or by the king's enemies, he is still liable (a). Covenants of accidents by fire excepted, are now in many instances introduced into leases, in order to protect the lessee, who would otherwise be liable to rebuild under his covenants to sustain, maintain, repair and uphold: but where such exceptions are not made, it is the obvious duty of the lessee to insure, because he is bound to rebuild in any case.

When to be re-instated by lessee.

He who took a thing on hire, according to the civil law, cannot put it to any other use than that for which he hired it. Thus, the lessee of a tenement, who is prohibited by the covenants of his lease from making a fire within it, or any other prohibition, cannot do any of the things from which he is so prohibited; for if he does, and there happen a fire, he is liable to an action for damages, even if the fire in question be occasioned by accident (b); for it is the tenant's fault that has occasioned the accident, and he has committed a breach of covenant.

Fires made in prohibited places.

In the case of *Bullock v. Domett* (c), it was expressly determined, that the lessee of a house, on a general covenant to repair during the term, was bound to rebuild, in case the house be consumed by an accidental fire. Therefore as I have before

General covenants to repair include damage by fire.

(a) Com. Rep. vol. ii. p. 627. Term Rep. vol. vi. p. 650. Dyer's Rep. p. 33. Show. Rep. vol. ii. p. 401. Ves. Rep. vol. iii. p. 34. Co. Lit. 37 a. n. i.

ignem ne habeto, et habuit, tenebitur, etiam si fortuitus casus admisit incendium, quia non debuit ignem." Just. Dig. lib. xlvii. tit. 10. leg. 11. § 1.

(b) "Si hoc in locatione convenit

(c) Term Rep. vol. vi. p. 650.

observed in alluding to the preceding cases of *Monk v. Cooper* &c. that the exception of accidents by fire should be introduced into the covenant for payment of the rent, as well as into the covenant for repairs, in order to exempt the lessee from the obligation of paying rent, as well as rebuilding in case the house should be destroyed or dilapidated by fire.

Tenants at will  
how far liable  
to re-instate  
damage done  
by fire.

In Lord *Hale's* manuscript notes to Lord *Coke's Reports* (a), on the maxim, that an action on the case will not lie for permissive waste, he cites the case of the *Countess of Shrewsbury*, who brought an action on the case against one of her *tenants at will* for so negligently taking care of his fire that the house was burned. The whole Court held, that neither action on the case, nor any other action lay, because at common law and before the time of the Statute of Gloucester, action did not lie for waste, against a tenant for life or years, or any other tenant coming in by agreement of parties, and that tenant at will is not within the statute. But the doctrine, says Mr. *Hargrave*, in one of his copious notes to Lord *Coke's First Institute* (b), that no action lies, should be understood with some limitation; for if tenant at will, stipulates with his lessor to be responsible for fire by negligence, or for other permissive waste, without doubt an action will lie on such *express* agreement. The same observation holds with respect to tenants for life or years before the passing of the Statute of Gloucester; for though the law did not make them liable to any action for waste, yet it did not restrain them from making themselves liable by *agreement*.

Concerning  
accidental  
burning of  
houses.

It may be of use here to add something more from the same eminent lawyer (c), as to the accidental burning of houses, so far as regards landlord and tenant. At the common law, he says, lessees were not answerable to landlords for accidental or negligent burning; for as to fires by accident it is expressed in *Fleta* (d), that *fortuna ignis vel hujusmodi eventus inopinati omnes tenentes excusant*; and *Lady Shrewsbury's* case before

(a) Co. Rep. part v. fo. 13 b.

(c) Ibid.

(b) Co. 1st Inst. fo. 57 a. n. 1.—

(d) *Fleta*, lib. i. cap. 12.

Thomas's edit. vol. i. p. 644, n. 19.

cited, he says is a direct authority to prove, that tenants are equally excusable for fires by *negligence*. Then came the Statute of Gloucester, which by making tenants for life and years liable to dilapidations and waste without any exception, consequently rendered them answerable for destruction by fire. Thus stood the law, he says, in Lord Coke's time; but now by the 6 Anne, c. 31, the ancient law is restored, and the distinction introduced by the Statute of Gloucester between tenants at will and other tenants is taken away; for the statute of Anne exempts *all persons* from actions for *accidental* fire in any house, except in the case of special agreements between landlord and tenant. So much relates to tenants coming in *by act or agreement of parties*.

As to tenants of particular estates, continues Mr. *Hargrave*, coming in by act of law, such as tenant by the curtesy, tenant in dower, and also before the statute for taking away military tenures, guardian in chivalry, these, or at least the two latter, being at common law punishable for waste, were therefore responsible for losses by fire; unless indeed they were answerable for waste voluntarily only, and not for waste *permissive*, which is a distinction that Mr. *Hargrave* says he had not met with in any book. If then, he says, tenant by the curtesy and tenant by dower were by the common law responsible for accidental fire, it may sometime or other become necessary to determine whether they are within the statute of Queen Anne. The statute in expression is very *general*, the words being, that no action shall be prosecuted against *any person* in whose house any fire shall *accidentally* begin; and it seems calculated to take away all actions in cases of accidental fire as well from other persons as from *landlords*.

Particular tenants how far responsible for damage by fire.

To this Mr. *Hargrave* appends another note, that it has been doubted on the statute of Anne, whether a covenant to repair *generally*, extends to the cases of *fire*, and so becomes an agreement within the statute; and therefore where it is intended, that the tenant shall not be liable, it is most usual in the covenant for repairing, *expressly to except accidents by fire*. Note also, he says, that the distinction which is taken as to waste at common law, between tenants coming in *by act*

Doubt whether a *general* covenant to repair extends to damage by fire.

of law, and tenants whose estates accrue *by act of parties*, will not universally hold; for tenants by statute-merchant and statute-staple, though they come in by *process of law*, are not, says Lord Coke (a) punishable for waste. Mr. Hargrave says, perhaps the reason of this may be, that it is in the power of debtors to prevent the commencement of these estates, or to determine them by paying the debts for which creditors have such estates, and also that the tenants of such estates are accountable for all profits they make beyond the amount of the debts due to them.

The following case of *Panton v. Isham* (b) sets a case of negligently keeping a fire, and a remedy for neglect, in a clear point of view:

Remedy for a case of negligently keeping fire.

This was an action on the case, and declared on the custom of the realm, that every one ought to keep their fire so, that by default thereof no damage should happen to another; and that the defendant so negligently kept his fire, that *six stables, six hay-lofts and three lodging rooms* of the plaintiff were thereby burnt. The defendant pleads *Not Guilty*, and on a special verdict it was found that the plaintiff was seised of the stables &c. and demised one of the stables to the defendant for a week for 8s. and so from week to week, at 8s. per week, as long as both parties should please, and demised the other five stables to divers other persons for divers terms yet to come, whereby they were possessed; and being so possessed, the fire by the defendant's negligence, six weeks afterward begun in the stable demised to the defendant, and burnt the same and all the other stables &c. And if for the plaintiff &c. Damages 95*l.* and tax the damages severally, viz. 15*l.* for the stable demised to the defendant, and 80*l.* for the others and costs 20*s.* and upon several arguments last Term and this Term, judgment was given for the plaintiff for the 80*l.* and for the defendant for the 15*l.* and they resolved the writ to be good, though it were *alicui alio* (for which no damages should be) and not *vicino* as was objected. 2dly, that for the stable demised to the defendant himself, no action lay; for the de-

The action lies not by lessor against lessee, or tenant at will.

(a) Co. Rep. part vi. fo. 37.

(b) Lev. Rep. part iii. p. 359.

mise to him could be no more than a term for three weeks, and for the residue he was tenant at will, against whom no action lay for negligent waste, as 5 Co. 13; *The Countess of Salop's* case. But 3dly, as to the stables demised to the others, the action well lies, as if they were the stables of strangers, and not of the lessor; for as to them there is no privity between the plaintiff and defendant, but as to them they are as nothing, or as to other persons. 4thly, although the other stables &c. were in lease to others, who may have an action as to the possession of their losses, yet the lessor may also have an action for the damages to his inheritance, as was formerly adjudged in this Court in the case of *Beddingfield* against *Onslow* (a), *Levinz* of counsel for the plaintiff.

The action lies by him in reversion against strangers, notwithstanding a term in case.

In a treatise on dilapidations, a short space may not be misapplied on the subject of party-walls and the Building Act. Party-walls are those walls which are common to two houses or parties which stand equally or in proportion on the soil of each, and belong to the owner or owners of both houses.

On party-walls.

The ancient Romans had laws for the regulation of party as well as external walls, at a very early period of their history. *Pliny* (b) and *Vitruvius* (c) allude to laws regulating the thickness of walls; the laws of the Twelve Tables provide also regulations as to buildings; and the laws of *Justinian* abound with sound and useful regulations, such as might be expected from such jurists and such architects as the Romans (d).

Laws of the Romans relative to party-walls.

The French laws as to party-walls &c. are drawn in a great measure from those of the Romans, and ought to be consulted with them in any new arrangement of our present incomprehensible Building Act. Law 653 of this Code (e) enacts, that

The French civil code as to party-walls.

(a) Hill. 36 & 37 Car. 2.

(b) *Pliny*, lib. xxxv. c. 14.

(c) *Vitr.* lib. ii. c. 8. De altitudine edificiorum et de crassitudine parietum, Gwilt's Translation, p. 62.

(d) See also, *Justinian's Pandects*,

*Digest*, Codex &c. de Muris &c. and the Treatise on Architectural Jurisprudence, part I. chapter viii. on the Roman civil law, as relates to architectural jurisprudence.

(e) Code Napoleon, loi 653, et seq.

in towns and fields, every wall which serves as a boundary between buildings, even to its base, or between courts and gardens, or even between inclosures in the fields, is presumed party, if there be title or mark to the contrary.

Law 654, that it is a mark of non-partition when the summit of the wall is straight and perpendicular, with its base on one side, and presents on the other an inclined plane.

Again, when there is on one side, only a coping or ridge and shouldering pieces of stone, which might have been placed there in building the wall.

In such cases the wall is deemed to belong exclusively to the proprietor on whose side are the eaves or corbels and ridges of stone.

Law 655, that the reparation and re-building of the party-wall are at the expense of all those who have claim thereto, and in proportion to the claim of each.

Law 656, nevertheless, each joint proprietor of a party-wall may relieve himself from contributing to the reparations and re-building by abandoning his claim of partition, provided that the party-wall do not sustain a building belonging to him.

Law 657, enacts, that every joint proprietor is at liberty to build against a party-wall, and to place beams and joists in the whole thickness of the wall, except fifty-four millemetres (about two inches of our measure) without prejudice to the right which his neighbour has to cause the beam to be reduced by the chisel to half the thickness of the wall, in case the latter shall desire to fix beams in the same place, or to build a chimney against it.

Law 658, that every joint proprietor may cause a party-wall to be built higher, but he must alone defray the expense of such elevation, of the necessary reparations above the height of the common inclosure, and furthermore, of an indemnity

against the expense in the rate of the additional building, and according to the value.

Law 659, requires, that if the party-wall is not in a condition to support the additional building, that he who desires to elevate it must cause it to be entirely rebuilt at his own expense, and that the excess in thickness must be taken from his own side.

Law 660, that the neighbour who has not contributed to the elevation, may acquire right of partition by paying half of the expense it has cost, and the value of one moiety of the soil furnished for the excess of thickness, if there be any.

Law 661, enacts, that every proprietor joining a wall has in like manner the power of rendering it common, in whole or in part, by paying to the owner of the wall the half of its value, or the half of the value of that portion which he desires to make common, and the half of the value of the soil on which the wall is built.

Law 662, that one of two neighbours must not form in the body of the party-wall any hollow, nor apply or lean any work against it, without the consent of the other, or, on his refusal, without having directed, under the advice of competent persons, the necessary means for erecting such new work without injury to the rights of the other.

Law 663, that each inhabitant of a town or suburb can compel his neighbour to contribute to the construction and reparation of the inclosure forming the boundary of their houses, courts and gardens, situated within the said towns and suburbs. The height of the inclosure is to be fixed according to the particular regulations or constant and acknowledged usages; and in defect of such usages or regulations, every boundary wall between two neighbours which shall for the future be constructed or rebuilt, must be at least thirty-two decimeters (about ten English feet) high, including the coping, within towns containing fifty thousand souls and upwards, and twenty-six decimeters (about eight English feet) in others.



Law 664, that when the different stories of a house, belong to different proprietors, if the titles to the property do not regulate the mode of reparations and reconstructions, they must be made in manner following; that is to say,

That the main walls and the roof are at the charge of all the proprietors, each in proportion to the value of the story belonging to him.

The proprietor of the first story, is to erect the staircase which conducts to it; the proprietor of the second story is to carry the stairs from where the former ends to his apartments; and so on of the rest.

Law 665, on the rebuilding a partition wall or a house, the servitudes, active and passive, continue with respect to such new wall or house, without power nevertheless to increase them, and provided the reconstruction have taken place before a right by prescription has been acquired.

Laws and  
Customs of  
England as to  
party walls.

The laws of England, and particularly those which relate to the metropolis and its environs, are to be found principally in the Building Act, and in such cases as have been decided by our Judges; but the following illustrations will, I trust, throw some light on this department of our profession:

Lessor of te-  
nement at  
rack rent  
liable to ex-  
penses of  
party walls in  
certain cases.

The lessor of a house at a rack rent, when there is no other person entitled to *any* kind of rent, is liable to contribute to the expenses of a party wall, under the statute of 14 Geo. 3. commonly called the Building Act, although the lessee has improved the house demised. This was determined in the case of *Beardmore v. Fox* (a), which was tried before Lord *Kenyon*, at Westminster, when the jury, under his lordship's direction, found a verdict for the defendant, subject to the opinion of the Court on the case therein stated. After the case, by Mr. *Abbott* (now Lord *Tenterden*) on the one side, and Mr. (now Justice) *Gaselee* on the other, the Court were of opinion, that under this act the expense of the party wall must be borne by the landlord; that if they were to put a

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(a) *Duraf. & East*, vol. viii. p. 214.

different construction on the statute, every lessee at rack rent, who happened to improve the house demised to him, would be liable to such expense in consequence of his improvements, which was highly unreasonable.

In an action of covenant for not repairing a party wall, the defendant cannot pay money into Court on the common rule; as instanced in the case of *Salt v. Salt* (a), and in an action on the case for waste, the defendant can neither plead a tender, nor pay money into Court.

Actions for not repairing a party wall money cannot be paid into Court.

In a lease where the tenant of a house covenants to pay a reasonable share and proportion of *supporting, repairing, amending and cleansing all party walls*, party gutters &c. and the party walls are afterwards *pulled down and rebuilt*, under the statute of the 14th Geo. 3. c. 78, the *tenant* and not the landlord, is bound to pay the moiety or share of building the party wall.

Covenants to pay reasonable share of repairing party walls compelled to rebuild under the act.

This doctrine was determined by the Court of King's Bench, in the case of *Barrett v. The Duke of Bedford* (b). On the trial of this action of *assumpsit*, which was brought by the plaintiff to recover the sum of one hundred and ninety-five pounds paid by him for the proportionate expense of a party wall, built by the proprietor of the adjoining house, a verdict was taken for the plaintiff for that sum, subject to the opinion of the Court upon the case, as fully reported in *Durnford and East* (c).

It was contended for the plaintiff, that the defendant must be considered as the owner of the improved rent, and was consequently liable to the expense under the before-mentioned statute. That if not owner of the improved rent, this must be considered as a lease at rack rent; and there being but one rent, the expense of the party wall must fall on the landlord;

Plaintiff's case.

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(a) Durnf. & East, vol. viii. p. 48. (b) Durnf. & East, vol. viii. p. 662.  
(c) Durnf. & East, vol. viii. p. 214.

as ruled in the cases of *Beardmore v. Fox* (a) and *Southall v. Leadbetter* (b). And as to the covenant to *repair*, it could not extend to rebuilding.

Lord *Kenyon's*  
opinion.

But Lord *Kenyon* was of opinion, that as the covenants were the covenants of the tenant, and it is a general rule that the words in a deed are to be construed most strongly, *contra proferentem*.

Judge *Grose's*  
opinion.

Judge *Law-*  
*rence's* opinion,  
and Judge *Le*  
*Blanc's*.

Mr. Justice *Grose* considered the plaintiff as owner of the improved rent, and consequently liable, but Mr. Justice *Lawrence*, did not conceive it necessary to determine which was the owner of the improved rent in this case, and determined on the covenant, as did Mr. Justice *Le Blanc*, and that the expense must be borne by the defendant.

Judgment.

*Postea* to the defendant.

Before an action can be brought in party-wall cases, accounts must be delivered as enacted.

It would be well for my brethren of the architectural profession to remember, that before an action can be maintained, on the statute of the 14th Geo. 3. c. 78. commonly known by the name of the Building Act, to recover a proportion of the expenses of building a party wall, the accounts prescribed by the 41st section must be delivered, whether the house be occupied by the owner or a tenant; and a formal demand of the money must be made twenty-one clear days before the action be brought.

Argument for  
plaintiff.

This important rule in the bringing of actions for the recovery of the expenses incurred in the building of party walls under the powers of the Building Act, was determined by the Court of Common Pleas, Sir *James Mansfield* being Chief Justice, in Trinity Term, 49 Geo. 3. (17th June, 1809), in the case of *Philp v. Donald* (c). In this case the plaintiff declared in *assumpsit* for part of the expense of building a certain party wall, which had been built at the plaintiff's cost,

(a) Durnf. & East, vol. viii. p. 214. (b) Durnf. & East, vol. viii. p. 458.

(c) Taunt. Rep. vol. ii. p. 66.

according to the directions of the statute of the 14th Geo. 3. c. 78. (the Building Act) between a messuage of the plaintiff and an adjoining messuage, of which the defendant was, at the time of building, and finishing the same, both *owner* and *occupier*, and entitled to the improved rent.

Upon the trial of this cause in the Common Pleas, before the Chief Justice, at the Sittings after the preceding Easter Term, the facts appeared to be, that the plaintiff had taken down an old party wall, which stood between his own house and the contiguous house of the defendant, which was in her own occupation, and had built a new party wall in the stead of it, at the expense of three hundred pounds, forming part of an entire new house, which the plaintiff had erected there for himself; and no account of the expense of the party wall was delivered to the defendant until after the whole house was completed.

It was objected on behalf of the defendant, that the plaintiff had failed to prove four essential things: *first*, that he had paid the money for the work which had been done; *secondly*, that he had delivered at the adjoining house, within ten days after the wall was built, a true account in writing, as required by the 41st section, of the number of rods in the party wall; or, *thirdly*, of the deduction to which the owner was entitled, under the same statute, to make, in respect of the materials of the old party wall; and *fourthly*, that no demand had been made of the money due, nor had there been consequently any failure to pay within twenty-one days after demand, which was necessary to constitute the very foundation of the action.

Argument for  
defendants.

The jury found a verdict for the plaintiff, for the proportion of the sums claimed, which would be due if the house benefited were of the same class with the plaintiff's; with leave for the plaintiff to move to reduce the damages, or to enter a nonsuit.

Verdict.

Mr. Serjeant (now Chief Justice) *Best*, obtained a rule nisi in the preceding Term, and on this day Serjeant *Shepherd*

Argument be-  
fore the Court.

shewed cause for the plaintiff, and Serjeant *Best*, *contra*, for the defendant.

Rule of the Court.

Sir *James Mansfield*, the Chief Justice, made the rule absolute to enter a nonsuit, observing that the words of the act which give the action are, "and in case the *same* shall not be paid within twenty-one days after demand thereof, then the *same* shall and may be recovered, together with full costs of suit, of and from each owner and owners." Is not "the *same*" still the price to be paid for building the wall, shoring up the adjoining house, and such like operations? and there is nothing else in the sentence to which the word *same* can refer. Is not then the sum to be contained in that account? The act says nothing of the occupier having twenty-one days to pay it in; it states that twenty-one days after demand thereof, an action may be brought against the owner. The account delivered in this case contained no hint of the value of the old materials, nor was any formal demand made. The *statute* requires a formal demand of the money before an action can be brought, as much as the *common law* requires a formal demand upon an entry for forfeiture.

Lessees at rack rent liable to expense of rebuilding party walls.

If the lessee of a house at a rack rent underlet it at an advanced rent, he is liable to contribute to the expenses of a party wall, built under the powers of the Building Act; nor is the operation of the statute at all varied by any covenants to repair, entered into between the landlord and his tenant, as decided by the Court of Common Pleas on the 20th June, 1798, in the case of *Sangster v. Birkhead* (a), which being of considerable importance in the elucidation of this doctrine, and the arguments on the statute, both by the learned judges and the counsel being very full and explicit, I have given at length, as follows:

Illustrative case.

A person of the name of *Woodward*, being, conjointly with his wife, seised in fee of a certain house in London, demised

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(a) Bos. & Pul. Rep. vol. i. p. 467. and *Lambe v. Hemans*, Bar. & Ald. See also the cases of *Robinson v. Rep.* vol. ii. p. 467. *Lewis*, East's Rep. vol. x. p. 227;

it by lease, bearing date the 29th March, 1777, to the defendant *Birkhead* for a term of twenty-one years, which expired at *Lady-day* 1798, at the yearly rent of *forty-four pounds*, deducting the land tax.

The defendant demised the premises for a term of eighteen years and ten months, from the 1st of May, 1779, to one *Robert Sugden*, at the yearly rent of *sixty pounds*, also deducting the land tax.

In this lease among the other usual covenants on the part of the lessee, there was one "to make all needful and necessary reparations whatsoever," in which no exception was made as to accidents by fire, nor was there any covenant on the part of the lessee to insure.

This lease was assigned by *Sugden* for a valuable consideration, and, after several mesne assignments, it came, on the 19th May, 1787, to the plaintiff *Sangster*.

In May 1795, a fire having happened in the adjoining house, by which that house was entirely consumed, and the roof of the plaintiff's house injured, the owners of the site of the said adjoining house being desirous of rebuilding it in a proper and effectual manner, had the party wall surveyed and examined by four surveyors, and a certificate delivered to the plaintiff under the authority of the *thirty-eighth section* of the Building Act, certifying under their hands, that the wall was, in the opinion of the said surveyors, condemned as decayed and ruinous. It was accordingly rebuilt, and the plaintiff called upon for a moiety, his proportion or share of the expense. This sum he paid, and deducted it out of the rent due to the defendant, who distrained for rent in arrear to that amount.

The cause came on for trial before Mr. Justice *Rooke* at Guildhall, during the Sittings after Easter Term, when the surveyors gave evidence, that they had condemned the wall under the authority and according to the provisions of the

Account of  
the trial.  
Surveyors'  
evidence.

Building Act, as ruinous and decayed: that it was probably built soon after the fire of London, in 1666: that they could not decide whether it was originally ill built, or had received some injury from external violence, but that it was not injured by fire.

[Verdict. A verdict was taken for the defendant, in order to ascertain the sum due, subject to the opinion of the Court.

Rule setting aside the verdict. Serjeant *Adair* having on a former day obtained a rule ~~miss~~ for setting aside that verdict, and entering one for the plaintiff,

How owners are to be reimbursed part of their expense, and in what proportion, who have built party walls.

Serjeant *Shepherd* now shewed cause. He contended, that the first question was, whether the defendant could be considered as the owner of the improved rent (*a*), within the meaning of the statute of the 14th Geo. 3. c. 78. s. 41, which enacts, that the person at whose expense any party wall shall be built, agreeably to the directions of that act, shall be reimbursed by the owner or owners who shall be entitled to the improved rent of the adjoining building, in the proportion therein mentioned; that the first builder shall leave at the adjoining building an account of the sum to be paid by such owner; whereupon it shall be lawful for the tenant or occupier of such adjoining building to pay such proportional part of the expense to the first builder, and to deduct the same out of the rent which shall become due from him to such owner or owners, until he be reimbursed the same.

Second question in this case.

The *second* question, said the learned Serjeant, was, whether under the terms of the lease, the plaintiff was not bound to repair the wall at his own expense, or whether he was relieved from the performance of his covenant by the Building Act. *First*, he said, the object of this act was to throw the

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(*a*) Another very important case (*Collins v. Wilson*) on this subject, and of more recent date, having been tried before Chief Justice Best, at Westminster, in Easter Term last (1828), and argued for a rule to shew cause to set aside the verdict, is given in the Appendix, No. XXXVII, which see.

burthen on those persons who derive a benefit from the improved rent, such as the lessee of a ground rent on a building lease; it was never intended to apply to persons who having taken a lease at a rack rent, afterwards underlet at a rent somewhat higher. The defendant, he contended, was not the owner of the improved rent, but of an increased rent only.

It seems to have been the opinion of Lord *Kenyon* and Mr. Justice *Buller*, in the case of *Southall v. Leadbetter*, given in page 224, that persons who take leases at a small rent, and afterwards improve them so as to create a new estate, should be liable. But a person who takes a house in the city of London, at a rack rent, and afterwards underlets it to one who wants to come into his business, and therefore gives a better rent for the house, is not the owner of the improved rent within the meaning of the act; for if he were, there might be six different owners of the improved rent of the same house; and in the case of *Peck v. Wood* (a), the distinction there taken was, between the *improved* rent and the *ground* rent.

Lord *Kenyon's* and Judge *Buller's* opinion.

*Secondly*, supposing the defendant to be the owner of the improved rent within the meaning of the act, still, he contended, the plaintiff was bound by his covenant to repair, and was not exempted from the performance of those covenants by the act.

Custom of the city of London.

Covenants to repair, render nugatory the provisions of the Building Act.

The Court said, they could not meddle with that question, as the legislature certainly never meant to incumber itself with the covenants which parties might make with each other (b).

Rule of the Court as to that question.

Mr. Serjeant *Adair* now rose to argue on the contrary side, but was stopped by the

Chief Justice, *Eyre*, who said, I dare say that the leading object of the legislature was to make the owner of the improved rent liable, as opposed to the ground landlord. But though that may have been the leading object, yet the expressions of the act being such as they are, we must deal with

Decision of the Court of Common Pleas in this case. Chief Justice *Eyre's* opinion.

(a) Term Rep. vol. v. p. 130, and a subsequent part of this Chapter.

(b) See, however, the case of *Barrett v. The Duke of Bedford*, referred to in page 215.



them as well as we can, and find an owner of the improved rent in all cases, though there should be no ground rent reserved. In this case the original landlord made a lease for twenty-one years to a person who again underlet the premises. Who then is the person to be considered as the owner of the improved rent, but the man, who on all the subsisting leases, has the best rent.

But, whether he be the person or not, I have much doubt as the question now stands, if the defendant can avail himself of the objection which he has taken. I think that it was intended by the legislature that the tenant should pay a moiety of the expense to the person building the wall, and reimburse himself by deducting the amount out of the rent of his immediate landlord, leaving it to him to make his claim on such other persons as he may think liable.

That appears to me the best construction for putting the business in a practicable shape. I should incline to that opinion even if it were made out that the covenant on the part of the tenant to repair, included this case; for though the conduct of the tenant might be a breach of covenant, it would be fitter that the damages should be settled in an action of covenant, than to break in on the rules established by the statute.

He declares the Building Act to be an uncertain and an ill-penned law.

It is easy, said the learned Chief Justice, to see that *this is an ill-penned law, and its meaning is left uncertain*; but in the present case, I do not know how to determine who is the owner of the improved rent, if it be not the person who takes the best rent.

Possibly it may be said that *Woodward* and the defendant should pay in certain proportions; let them, however, settle that in such actions as they may think fit to bring. I know no way of executing this law, if we enter into all the derivative claims of different landlords (a). If the tenants pay the

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(a) See Lord Kenyon's opinion on the same point, in the case of *Beardmore v. Fox*, ante, page 216.

money, let him reimburse himself, and leave the other parties to dispute among themselves.

Mr. Justice *Buller* said, I agree in opinion with my Lord, Judge Buller's opinion. and think his construction of the act clear and intelligible. There are three parties in this business; namely, the person who built the wall, the tenant and the tenant's immediate landlord.

The owner of the adjoining house, pursued the directions of the act, which gave him a right to call on the plaintiff for a moiety of the expense. That being settled, how does the case stand between the tenant and his landlord?

I agree that we must consider whether the landlord be the owner of an improved rent. But in this case he has an improved rent, since he receives more than the person of whom he took the premises; and if the landlord has the improved rent, he certainly is liable, though there be only one year of the term to come.

As to the question whether the expense can be apportioned, Lord Mansfield's opinion, that in such cases parties should be liable to a rateable proportion. that does not arise here; but if any thing could be found to warrant an opinion thrown out by Lord *Mansfield* (a), that the parties might be liable to a rateable proportion in some cases, it would tend much to the advancement of justice. The building a party wall is certainly a great improvement to the premises, and every person interested in the fee, and receiving a benefit from it, ought to contribute.

Mr. Justice *Heath* thought the construction which had Judge Heath's opinion. been put on this statute, to be the true and necessary construction. The legislature seemed to think that there must be an owner of an improved rent in respect of every house; and that we need not look further than the landlord immediately above the tenant who pays.

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(a) In the case of *Stone v. Greenwell*, Term Rep. vol. iii. p. 461.

Judge *Rooke's*  
opinion.

Mr. Justice *Rooke* said, I do not know how any other construction can be put upon this act than that which has been suggested. The words of the statute are, "that it shall be lawful for the tenant or occupier of such adjoining building or ground, to pay one moiety, or such proportional parties aforesaid, to such first-builder or builders for the same."

This plaintiff was the tenant, and it was therefore lawful for him to pay, and he was to reimburse himself by deducting the rent due from him to his landlord; if that landlord was the owner of the improved rent; but not if he was only owner of the ground rent.

Decision.

Rule absolute.

Another case  
to the same  
point.

The case of *Collins v. Wilson* (a) referred to in a note to the previous case (b), has a bearing on the same question, of who are to defray the expense of building party walls under the powers of the Building Act; and it was there held, that where a person took ground on a building lease, at the yearly rent of five pounds, and subsequently underlet a part of the same ground at twenty pounds a-year, he was therefore the owner of the improved rent, under the act, and as such was liable to contribution to a party wall used in the erection of a house on such land. From which it appears, that the notice required by the 41st section of the act, does not apply to the erection of a new building, but only to the renewal of an old party wall.

Whether a  
lessee who had  
sold his lease  
for a premium,  
is liable to ex-  
penses for  
party walls.

In the case of *Southall v. Leadbetter* (c), which was an action in replevin for 20*l.* for a quarter's rent of a house in Shugg Lane; and was brought in the Court of King's Bench, and tried before Lord *Kenyon*, and argued before the Court in Michaelmas Term, in the 30th year of George the 3d (d). The question at issue was, where a lessee for twenty-one years at a pepper-corn rent for the first half-year, and at a rack-rent

(a) Appendix, No. XXXVII.

(b) Term Rep. vol. iii. p. 452.

(c) Ante, p. 120, n. (a).

(d) F. & M. Nov. 20th, 1799.

for the rest of the term, who by agreement was to put the premises in repair, and covenanted to pay the land-tax and all other taxes, rates, assessments and *impositions*, having assigned his term for a small sum in gross, was held *not to be liable to pay the expense of a party wall, either by the provisions of the statute or the covenant: but that charge must in such case be borne by the original landlord.*

The statute of the 14th Geo. 3. c. 78. s. 41, intended to throw that burthen on persons to whom long leases had been granted, with a view to an *improvement of the estate*, and who afterwards *underlet* at a considerable *increase of rent*. A lessee of such a term, who afterwards *sells the lease for a sum in gross*, is also liable within this act.

At the trial before Lord *Kenyon*, the jury found a verdict for the plaintiff, subject to the opinion of the Court on the following case, in order to try the single question whether *Lygow*, the assignee of the lease of the house for which the rent was claimed to be due, or *Winter*, was to pay the moiety of the expense of re-building a party wall between that house and the adjoining one.

Verdict on the trial.

*Winter* was the landlord of the premises in question, and was seised in fee thereof. *Lygow* was occupier of part (a) of the premises and was the assignee of a lease thereof granted by *Winter* to one *Foulston* deceased, for twenty-one years, dated the 3d July, 1786. By this lease which recited an agreement in writing, dated the 14th October, 1784, between *Winter* and *Foulston*, that the latter should repair the messuage and premises therein mentioned, according to the particulars ascertained by a surveyor, and that he would, on or

Statement of the case.

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(a) It was not stated in the case, were several defects, say Messrs. that Sonthall was the occupier of the other part: but it seems as if he must have been the occupier, as under-tenant to *Lygow*, otherwise he could not have been the plaintiff. There were several defects, say Messrs. Durnford and East, who reported the case, both in the pleadings and in the case reserved; but the parties agreed not to take any advantage of them, but to try the real question.

before the 24th June, 1785, at his own proper costs and charges, put the said messuages and premises into good and sufficient repair. On finishing which, *Winter* would make a lease thereof to *Foulston*, to commence from Midsummer-day then last past, for twenty-one years, under the rent of a pepper-corn for the first half-year of the term, and under the clear yearly rent of 120*l.* for the remainder of the term. It also recited that the said *Foulston*, in pursuance of that agreement, had expended a certain sum therein named.

*Winter* demised the premises to *Foulston*, his executors, administrators and assigns, according to that agreement. The lease also contained a covenant by *Foulston*, by which he agreed to pay "from time to time and at all times during the term, the land-tax and all other taxes, rates, assessments and impositions whatever, already laid, assessed or imposed upon the said premises, or any part thereof, by authority of parliament or otherwise howsoever."

The case then stated, that *Foulston* laid out and expended in the repairs of the premises, the sum of 150*l.* and that though the consideration stated in the assignment to *Lygon*, appeared to be only 5*s.* yet that the sum actually paid as the consideration (a) for it, was 160*l.*

The old party wall was legally condemned in the year 1789, and the new wall was built according to the terms of the act of parliament. *Lygon* had paid for a moiety of the party wall, the bills for which exceeded the amount of the quarter's rent for which the distress was made. The said bills were tendered to *Winter* before the distress, but he refused to allow them. The premises in question were, previous to the commencement of the lease, let by *Winter* at a rent of 110*l.* a year, out of which he allowed to the tenant the land-tax.

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(a) See the case of *The King v. p. 474*, as to the law on giving out Scammonden, Term Rep. vol. iii. consideration and naming another.

Mr. (afterwards Baron) *Wood*, as counsel for the plaintiff, contended, that *Winter* was liable to pay the expense of building the party wall, and that the plaintiff was entitled by the 14 Geo. 3. c. 78. s. 41 (the Building Act) to deduct it out of the rent. By that statute, the learned counsel argued, that the *onus was thrown on the owner of the improved rent*; but that *improved rent* is used in contradistinction to *ground rent* and *rack rent*. Argument for the plaintiff.

In the present case there was only *one* rent, and to that rent, *Winter* was entitled. And as he granted that lease at a rack rent, reserving the best price which he could procure for it at the time (since he advanced 10*l.* a-year on the former rent, besides the land-tax, which he allowed to the former lessee) *he* was liable to bear that expense.

He contended that *Foulston*, the original lessee, could not be considered as the owner of the improved rent under the statute, from the circumstance of his having received 160*l.* from *Lygou*, as the consideration of the assignments; for he laid out a considerable sum in repairs when he first entered upon the premises, and he covenanted to pay a rent, which appeared to have been the full value of them. The legislature, he insisted, only intended that those lessees to whom building leases are granted on small ground rents, and who afterwards underlet at a great increase of rent, should be subject to this expense. But this was simply the case of landlord and tenant at rack rent; and it could not be collected from any part of the case, that *Lygou* was the owner of any improved rent, in which character only he could be made liable under this act of parliament. And it would be extremely hard, he said, on a tenant for only twenty-one years to be compelled to bear the expense of building a party wall, of which the landlord was to reap the advantage.

Mr. *Baldwin*, as counsel for the defendant, said, that it was the intention of the legislature, that the original landlord should not be called on to bear this expense in any case, where Argument for the defendant.

the tenant made any improvement on the estate, and received advantage from it.

Now it was stated in the case, that the estate had been improved by the first tenant laying out a large sum of money on it, and afterwards assigning the lease for 160*l.* and whether such a tenant was reimbursed by receiving a *gross sum*, or by an *increase of rent*, he was equally liable under this act of parliament. Otherwise that provision of the act would be entirely evaded; for then the first lessee would not let the estate at an improved rent, but would sell the term absolutely for a sum equivalent to the improvement.

The lease in question, the learned counsel contended, was undoubtedly more beneficial then, than it was at first; and the improvement was in the contemplation of the parties at the time of granting the lease. But however the general question might be determined, the parties in this case were concluded by the covenant in the lease, by which the tenant was to pay the land-tax and all other taxes, rates, assessments and *impositions* whatever &c. Now, the expense in question, he said, was an imposition; and it appeared by that covenant, that great caution was taken by the landlord to prevent any extraordinary expense being thrown upon him.

Reply. Mr. *Wood* rose to reply, but was stopped by the Court.

Decision of  
the Court.  
Lord *Kenyon*'s  
opinion.

The Chief Justice, Lord *Kenyon*, in delivering the determination of the Court, said, that the *improved rent* mentioned in that act of parliament, stands contradistinguished from *some other rent*; but in this case, no other rent was reserved, except that at the beginning of the lease. But it had been said, that the lessee received from his assignee *a sum in gross*, as the consideration for the purchase, which is equivalent to an *improved rent*.

If, indeed, a large sum were paid for the purchase of a lease, though no improved rent were reserved to the original lessee, I think he would be liable to pay this expense within the act of

parliament. But that is not the present case. For when *Winter* the landlord, granted this lease, he reserved the best rent which could be procured for it at that time, since this rent exceeds the rent formerly reserved by 10*l. per annum*, and the whole of the land-tax; and the case ought not to be varied by the circumstance of the estates gradually increasing in a small degree. Where the parties contract for a lease at a rack rent, the landlord is the person who ought to bear the expense of the party wall.

Then it was contended, that the full rent was not reserved originally, because it was stipulated that the tenant should lay out a considerable sum of money in improving the estate; but it must also be remembered, that in consideration of that expenditure, the lessee was to pay no rent for the first half-year, which might have been considered at the time as commensurate with the sum to be laid out in the repairs.

Neither is the lessee concluded by the covenant to pay the taxes, assessments, impositions &c. for that only extends to the land-tax, and all other taxes *ejusdem generis*. But this is not a tax; therefore the plaintiff in replevin is entitled to judgment, because he has overpaid the rent distrained for.

Mr. Justice *Ashhurst* said, the legislature intended to throw this burthen on the lessees of building leases, by whom the value of the estates is considerably improved, and who afterwards make under leases, reserving *improved rents*. Judge *Ashhurst's* opinion;

But in this case it does not appear that any greater rent was reserved to the first lessee, than there was at the time of granting the lease;

Mr. Justice *Buller* said, the case which the legislature had in view, was where a small sum is reserved as a ground rent on a long building lease; and the lessee, in consequence of the improvement, underlets it, reserving an improved rent. Judge *Buller's* opinion.



But here the plaintiff and defendant stand in the relation of landlord and tenant; and in the case of *Stone v. Greenwell* (a), the Chief Justice, Lord *Mansfield*, said, as the parties stood in the relation of landlord and tenant, the former was liable under this act of parliament, to pay the expense.

Judge *Grose's*  
opinion.

Mr. Justice *Grose* said, that it did not appear to him, that the statute was merely confined to building leases. The words of the act are so framed as to comprehend other cases; for the statute says, that the owner of the *improved* rent shall pay; but in this case there is only *one* rent reserved; he, therefore, is liable to pay this expense.

Judgment.

*Postea* to the plaintiff.

A manuscript  
case and opi-  
nion of Baron  
*Wood*.

In a similar case, a predecessor of mine (my father) had occasion, when employed in a party-wall question, to take counsel's opinion, where the tenant paid less rent than the value of the house he occupied; having himself made it that much more valuable by his judicious and expensive improvements. The counsel consulted was Mr. (afterwards Baron) *Wood*, a gentleman distinguished by the soundness of his judgment, and his perfect knowledge of the Building Act. The learned Baron's opinion coincides with those of the learned Judges in the above trial, although given previously, and remained in manuscript till published in the first edition of this work; and is as follows:—

#### Mr. Wood's OPINION.

Baron *Wood's*  
opinion.

The 41st section of the 14th Geo. 3. c. 78, directs that the expenses of building party walls be paid in moieties by the builder and the owner, who shall be entitled to the improved rent of the adjoining building, which I presume is the only clause applicable to the present question.

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(a) See the same learned Judge's opinion in the case of *Sangster v. Birkhead*, ante, p. 223.

There is no other improved rent, that I can observe, but the 20<sup>th</sup> a year reserved to Mrs. *Smith*, and therefore I think she is the owner entitled to the improved rent, within the meaning of the act; and in my apprehension, is the only person contributing to the expense of this party wall, and not Mr. *Exam*.

*I think the act does not mean to throw the burthen upon a tenant who may have an advantageous bargain, and for which he may have paid a premium, or who may, by repairs or alterations, have made the premises more valuable, or capable of being let for a much larger rent, if he receives no rent for them, but occupies them himself, and when in fact he pays to another the only existing improved rent there is.*

Thinks the act does not mean an improving tenant who occupies what he has improved.

If Mr. *Exam* means to charge Mrs. *Smith* with the moiety of the expense, I think he should be entirely passive, and leave the party giving the notice to proceed according to the act, without his (Mr. *Exam*'s) concurrence therein.

*Middle Temple,* (Signed) GEO. WOOD.  
21<sup>st</sup> Feb. 1789.

If a person by any act or omission damages a party wall, he is bound to repair it, as held by the Court of King's Bench in the case of *Tenant v. Godwin* (a), which occurred before the enactment of the Building Act, and wherein in an action on the case the plaintiff declared, that he was possessed of a messuage, and in a cellar, which was part thereof, he was wont to lay coals, beer &c.: that cellar joined to the defendant's messuage; and by a party wall, which the defendant *debit reparare*, was separated and defended from the defendant's privy, and that for want of repairing this wall, *seditates predict' in cellarium ipsius fluebant &c.* There was judgment by default and damages upon the writ of inquiry: and upon a motion in arrest of judgment, Chief Justice *Holt* was at first of opinion, that the defendant being a ter-tenant, the plaintiff could not put a charge upon him without

A party wall being damaged by a party, he is bound to repair it.

Defendant's privy separated by party walls from the plaintiff's cellar; defendant ought to repair the wall of common right.

(a) Salk. Rep. vol. i. p. 360. Mich. 3 Anne, B. R. Lord Raym. Rep. S. C. p. 1089.

shewing a special title: upon this it was afterwards argued, that there having been cases where the plaintiff has by a *de jure debuit & consuevit*, charged the defendant even where a ter-tenant (*a*). And that it is not necessary (*b*) in any case for the plaintiff to shew a title where the defendant is liable of common right. Thus it is not requisite in an assize for a rent service, or for common appurtenant, to make title even against the ter-tenant; *aliter* of an assize for a rent-charge or common in gross, unless the assize be against the pignor of the profits (*c*). That the flowing of this filth was an actual trespass, like the case of 6 E. 4. 7. (*d*), and that every man ought to keep and use his own, so as not to damnify his neighbour. That one man might compel another to repair his house, in several cases. Two joint-tenants of a house, one may have a writ *de reparatione faciendâ* against the other; and the writ supposes *quod ad reparationem & sustentationem domus tenetur*. *Aliter* of a wood and fence (*e*). So if H. has a house near another's, which he will not repair, a writ *de domo reparandâ* lies, and supposes *quod reparare debet* (*f*).

In what cases one man may compel another to repair his own house. Co. Lit. 54 b. 1 Rol. Rep. 182. 5 Co. 91 b.

Towards the end of the Term, judgment was given for the plaintiff; the Chief Justice saying, he did not approve of the case in *Kelw.* 98 b, and thought the writ in *Fitzherbert*, 127 b, must be founded upon the particular custom of places. The reason he gave for his judgment in the principal case was, because it was the defendant's wall and the defendant's filth, and he was bound of common right to keep his wall so as his filth might not damnify his neighbour; and that was a trespass on his

(a) Sands and Trefusis, Cro. vol. i. p. 575. In the case of a water-course, Lev. Rep. part iii. p. 266. In the case of a way, Lutw. Rep. vol. i. p. 119.

(b) Mod. Rep. vol. vi. n. 315. 116. 19. Vent. vol. i. p. 237. 239. 319. Lev. part ii. p. 148. Vent. vol. ii. p. 185, &c. Keb. vol. iii. p. 549.

(c) 32 H. 6. 15 a. 35 H. 6. 7 b.

(d) Fitz. Treas. 110.

(e) Mod. 374. 11 Co. 82 b. 9 Inst. 403. Reg. 153 b. Fitz. Nat. Brev. 127.

(f) The writ is good without a *sciel*. Reg. 153 b. Fitz. Nat. Brev. 127 c. d. Reg. 153 b. 1 Inst. 53 b.

neighbour (a); as if his beasts should escape, or one should make a great heap on the border of his ground, and it should tumble and roll down upon his neighbour's. That the case might indeed possibly be such, that the defendant might not be bound to repair; as if the plaintiff made a new cellar under the defendant's old privy, or in a vacant piece of ground, which lay next the old privy before; in such case the plaintiff must defend himself. But that cannot be the case here, for then he could not be bound to repair; and upon the words *debet reparare*, he must be acquitted upon the trial. But on the other side; if A. has two houses, and the house of office on the one is contiguous to the cellar of the other, but defended by a wall; and he sells this house with the house of office, the vendee must repair the wall; so if he keeps this and sells the other, he himself must repair the wall of the house of office; for he whose dirt it is, must keep it that it may not trespass. *Salkeld*, counsel for plaintiff. *Southouse* for defendant.

The owner of the *improved rent*, not of the ground rent, is liable to pay the expenses of a party wall, built under the authority of the Building Act; and the three months notice required by sect. 38, is only necessary where the person, who at the time when it is necessary to build &c. is liable to pay, cannot agree with the owner of the adjoining house. This was held in the case of *Peck v. Wood* (b), argued and determined by the Court of King's Bench, Hilary Term, 33 Geo. 3, Tuesday, January 29, 1793.

Rule as to the three months notice under the act.

This was an action of *assumpsit* to recover 42*l.* for half of the expense of a party wall between the plaintiff's and defendant's house, built by the former, under the stat. 14 Geo. 3. c. 78. §41. On the trial a special case was reserved for the opinion of this Court, in substance as follows:—

Statement of the case.

On the 18th November 1788, the defendant entered into an agreement with *W. Pateman* for a building lease of a piece of

Special case reserved.

(a) Nat. Brev. 127. 9 Co. Alured's case. Poph. 170. Hut. 136. 1 Sid. 167. 2 Keb. 825. Mod. Cases, 22. 245. 314. 1 Bulst. 116. Hob. 131. (b) Term Rep. vol. v. p. 130.

ground adjoining to the plaintiff's house in Princes Street, Westminster, whereon was standing a messuage and other buildings, for a term of *sixty-one years*, to commence from the 29th of September then last, at the yearly rent of 8*l.* free from all deductions whatsoever, whether parliamentary or parochial, then or thereafter to be imposed or assessed either on the landlord or tenant; and it was agreed that the defendant should immediately proceed to pull down the premises and erect thereon at least one good substantial brick dwelling-house, with necessary convenient out-houses and offices &c. and to lay out and expend in the erection of such new building 300*l.* at least. Pursuant to this agreement a lease of the premises was granted and executed in January 1789, by *Pateman* to the defendant. The plaintiff previous to the defendant's entering into the agreement with *Pateman* for the lease, had pulled down the old wall, which was standing between his (the plaintiff's) house, and the house and premises which the defendant took upon lease as aforesaid. On the 29th of September, 1788, the party wall was begun to be built; and on the 17th day of January following it was finished.

The three months notice was omitted.

In June 1790 the defendant let the house, held of *Pateman* to *J. Beach* at the yearly rent of 31*l.* 10*s.* the land-tax and sewers-tax deducted. It was absolutely necessary that the old wall should be pulled down. The defendant enjoyed the improved rent; and *Pateman* was still the ground-landlord. The plaintiff did not give three months notice in writing to *Pateman*, the then owner and ground-landlord of the house and premises, which were afterwards leased to the defendant, prior to his pulling down the party wall; but he applied to *Pateman* for that purpose, who agreed that it should be pulled down, if *Hawkins* did consent. The new party wall was built agreeably to the directions of the Building Act. The defendant has the benefit of the party wall, and that in a greater degree than the plaintiff, his house extending farther back than the plaintiff's.

Argument for the plaintiff.

Mr. (now Serjeant) *Onslow*, as counsel for the plaintiff, said, The statute 14 Geo. 3. c. 78. § 41, on which this action was

brought, enacts that "the person at whose expense any party wall shall be built agreeably to the directions of the act, shall be re-imbursed by the owner, who shall be entitled to the improved rent of the adjoining building or ground, and who shall at any time make use of such party wall, a part of the expense of building the same," (which part is afterwards explained to be one-half in such a case as the present.) Now it is stated in the case that it was necessary to build this wall, that the defendant enjoyed the benefit of it, and is entitled to the improved rent, which circumstances are sufficient to found this claim against the defendant; for *Pateman* is only the owner of a ground rent, and this duty is imposed by the Legislature on the owner of the improved rent, in express terms. Nor can any difficulty arise here from the want of notice to the defendant three months before the building of the party wall; for the notice required by sect. 38, only applies to the case of an adverse landlord. It says, "In case the owner of the adjoining house &c. cannot agree," then the notice is to be given, but here so far from *Pateman's* being adverse from the building of the wall, (and at that time he was the person immediately concerned,) it is stated that he did consent, provided the then tenant did not object. No notice to *Pateman* therefore was necessary, and the defendant, who now represents him is not entitled to notice if he were not. Besides, the defendant had no interest in this house when the old party wall was pulled down; and consequently no notice to him could have been given.

The notice applies to the case of an adverse landlord.

Mr. *Mingay*, as Counsel for the defendant, contended, on the contrary, that *Pateman*, not the defendant, was liable to pay this expense, the wall having been begun before the lease was granted to the defendant; and he argued upon the inconvenience of transferring this burthen to any subsequent tenant; observing, at the same time, that if it were first transferred from *Pateman* to the defendant, it must on the same principle be again transferred to *Beach*. That in the case of *Southall v. Leadbetter* (a), it was determined that a lessee, who sold his

Argument for the defendant.

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(a) Ante, page 216.

term for a sum of money in gross, was not liable to pay this expense, and that it was to be borne by the *original landlord*. That, at all events, the defendant was not liable in this particular case, no notice having been given to him. That, as it was admitted that no reason could be affected in an adverse manner without notice, this was an adverse claim as between these parties, and therefore notice was necessary; or that if it were not considered as adverse on account of the imperfect agreement with *Pateman*. *Pateman* was the person who agreed, and who consequently ought to pay this expense.

Lord Kenyon's  
opinion.

Lord Chief Justice *Kenyon*.—In this case *Pateman* is the owner of a ground-rent of 8*l.* per annum, and the defendant of the improved rent of 31*l.*; the latter therefore is the person who ought to, and whom the Legislature has in direct terms said should, pay a proportionable part of the expense of the party wall.

As to the three  
months notice.

Nor is there any foundation for the objection, that the defendant ought to have had three months notice. The plaintiff seems to have complied with the requisitions of the act of parliament. The notice required is three months before the beginning to build; but at that time the defendant had no interest in the premises; and *Pateman*, in whose situation the defendant is now placed, actually knew of the plaintiff's intention to build the party wall, and in a certain degree consented to it. No further notice therefore to him was necessary; and the defendant is not more entitled to notice than *Pateman* was.

Judge Buller's  
opinion.

Mr. Justice *Buller* said, the question is, whether by any adverse notice, or by express agreement, the plaintiff was entitled to build the party wall, and can now call on the defendant to reimburse for a proportional part of it. I agree with the plaintiff's counsel, that notice is only necessary in those instances where the party is either ignorant of, or adverse to, the building of the wall; but this was begun with *Pateman's* consent, and before its completion the possession of the house was changed. The defendant therefore was not entitled to notice, he standing in *Pateman's* place. And with regard to the prin-

cipal question, it would be unjust that *Pateman*, who receives a ground rent of 8*l.* only, and who derives no advantage from the party wall, should pay the expense of it, and that the defendant who does enjoy it, and who is in the receipt of an improved rent of 31*l.*, should not contribute any part of this expense.

Judgment for the plaintiff.

In an action for the negligence of defendant's agent in pulling down a party wall between the houses of the plaintiff and defendant, it was allowed as a good defence that the plaintiff appointed an agent to superintend the work jointly with defendant's agent, and that both agents were to blame.

Action for negligence in pulling down a party wall.

This point was illustrated in the case of *Hill v. Warren (a)*.

This was an action on the case by the plaintiff, who was the owner of a house in Great Wardour Street, against the defendant, the owner of the adjoining house, for so negligently taking down his house that the plaintiff's house was much injured.

Statement of the case.

It appeared that the parties had, previous to the pulling down the defendant's house, referred themselves to two arbitrators, who had awarded that the defendant should be at liberty to take his house down, on giving ten days notice instead of giving a notice of three months, according to the provisions of the Building Act. The plaintiff was tenant of the house, under Lord *Arundel*, who, at the instance of the plaintiff, interfered in the matter; and in consequence of such application, Lord *Arundel's* agent and the defendant each appointed workmen to pull down the old party wall and to rebuild it. The wall was accordingly pulled down by the joint agents, but for want of properly shoring up the back front of the plaintiff's house, it was considerably injured, and was in so dangerous a state, that the plaintiff and his family were obliged to leave it for some time.

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(a) Stark. Rep. vol. ii. p. 54.



## Defence.

It was objected on the part of the defendant, that the agents who conducted the work were appointed by the plaintiff jointly with the defendant, and that the latter was not liable for negligence in which the plaintiff's own agent was equally implicated, but

## Lord Ellenborough's opinion.

Lord *Ellenborough* was of opinion, that it was not competent to the plaintiff to attach that blame to the defendant which was the common blame of both; and that since the wall had been taken down by both, neither could impute negligence to the other.

Plaintiff nonsuited.

Messrs. *Scarlett* and *Comyn*, Counsel for the plaintiff; and Messrs. *Gurney* and *Manning*, for the defendant.

## CHAPTER IV.

### ON WASTE.

"I have been the more spacious concerning this learning of waste, for  
"that is most necessary to be known of all men."

LORD COKE (a).

**ON WASTE. — NUISANCES. — COVENANTS. — LEASES &c. —**  
*Definition of Waste. — Great care of our Ancestors as to  
Buildings, their preservation &c. — Various kinds of Waste  
described. — Legal Authorities and Cases. — Punishment and  
Remedies against Tenants &c. — Nuisances — Various sorts  
of. — Lord Coke's opinion of. — Illustrative Cases. — Cove-  
nants. — Various. — As to building, reparation, maintain-  
ing &c. — Opinions. — Illustrative Cases. — Leases. — How  
binding as to repairs, dilapidations, &c.*

**W**ASTE is a subject of great importance to landlords and  
tenants, and therefore deserving of the most serious attention  
from the architect, surveyor and builder. Of what importance  
Lord Coke thought the subject, his observation, that I have  
taken for the motto of this chapter, and the great space  
that he gave to it in his invaluable Institutes of the Laws  
of England, fully prove.

On the doc-  
trine of waste.

Lord Coke's  
opinion of its  
importance.

Sir Matthew Hale, as absolute a master of the science of  
law, as ever lived, termed the doctrine of waste "a great flood  
of learning" (b), reckoned it as the fifth sort of injury, and  
calls it emphatically, "destruction."

Sir Matthew  
Hale's opinion.

Sir William Blackstone says in his Commentaries (c), that  
the fourth species of injury, that may be offered to one's real

Sir William  
Blackstone's  
opinion.

(a) 1st Inst. orig. edit. fo. 54 b.—  
Thomas's edit. vol. iii. p. 250.

(b) Hale's Analysis of the Law,  
§ 42.

(c) Book iii. ch. 14.

property, is by waste or destruction in land and tenements. He reminds the student that waste is a spoil and destruction of the estate, either in houses, (which is the object of this Treatise) woods or lands; by demolishing not the temporary profits only, but the very substance of the thing, thereby rendering it wild and desolate; which the common law expresses very significantly by the word *vastum*; and that this *vastum* or waste, is either voluntary or permissive, the one by an actual and designed demolition of the lands, woods and houses; the other arising from mere negligence and want of sufficient care in reparations.

Design of the present chapter.

As it is not my intention to dive into this "great flood of learning," which, as Lord *Coke* (a) observes, abounds with a multitude of conclusions, with manifold diversities between cases and points of learning, with a variety almost infinite of authorities, ancient and modern, and with other difficulties only to be conquered by him who gives up his whole soul to its study:—I shall leave it to them whom the same noble and learned authority calls "Jurisprudent," embued with (b) "the gladsome light of jurisprudence, the loveliness of temperance, the stability of fortitude, and the solidity of justice." I shall therefore in this division of the Treatise, confine myself to that practical part of the doctrine of waste, that appertains to landlords, tenants, and students of my own profession.

Different kinds of waste.

Lord *Coke* (c) says there are two kinds of waste, *voluntary* or *actual*, and *permissive*; and in this he is followed by all subsequent authorities. Voluntary waste is an act of *commission*, as in pulling down a wall, taking off a roof and such like acts; and permissive waste is a matter of *omission*, as in suffering a tenement to fall into decay, for want of necessary reparations (d); both of which are equally injurious to the proprietor of the inheritance.

(a) Epilogue to his 1st Institute.

Thomas's edit. vol. iii. p. 233.

(b) *Ibid.*

(d) Co. 2d Inst. fo. 145 b.

(c) 1st Inst. orig. edit. fo. 53 a.—

The following analysis of the doctrine of waste, from Sir *Matthew Hale's Analysis of the Law* (a), will be found not only interesting to the reader, but useful to the student, as so many distributions and heads according to the analytical method, which he may dilate in his common place book, to his own great and manifest advantage.

Analysis of the law of waste.

The fifth sort of injuries, to things real, is *waste* or destruction. And this injury is of two kinds, according to these relations, namely;

In relation between the owner of the soil, and he that has a profit appendre out of it; as estovers, pawnage, &c.

If the owner of the soil destroys the wood, the remedy lies by ASSIZE.

Action on the CASE to recover damages.

In relation between the particular tenant and he that has the reversion or remainder of inheritance; as waste in houses, lands, woods &c. is a disinherison to the REVER-  
SIONER, who has remedy either,  
PREVENTIVE, by estrepement, prohibiting waste, which also lies against a tenant, where the land is in suit. Or,  
REMEDIAL, by action of waste;  
In the TENET;  
In the TENUIT.

And here comes in a great flood of learning:

What shall be said of waste:

When, and against whom it lies &c.

And although under this title of wrongs, *without removal of possession*, I have brought in remedies of assize &c. which *always* supposes a dispossession, yet really it is no dispossession in those cases before instanced, because they concern things *incorporeal*; wherein, though the party may admit himself disseised, it is but a disseisin *at election*, and rather made a disseisin by his bringing an assize, which a wrong-doer shall not dispute, than truly so.

(a) § xlii.

Wherein waste  
may be com-  
mitted.

WASTE, says Lord Coke (a), may be done in houses, by pulling or prostrating them down, or by suffering the same to be uncovered, whereby the spars or rafters, planchers and other timbers of the house are rotten. But according to *Knoll's case* (b), tried in the Court of Common Pleas, Easter Term, 9 James 1, the bare suffering them to be uncovered, without rotting the timber, is not waste. Converting two chambers into one, or *à converso*, is also waste, as decided in *Graves' case* (c), Hilary Term, 4 James 1.

Examples of  
waste.

If the house be uncovered when the tenant cometh in, says Lord Coke (d), it is no waste in the tenant to suffer the same to fall down. But though the house be ruinous at the tenant's coming in, yet if he pull it down, it is waste unless he re-edify it again. If a house built *de novo* was never covered in, it is not waste to abate it (e). So if the house was ruinous at the commencement, and he suffers it to become more ruinous, it is waste. So it is if he permits the walls of his house, or the chambers thereof to be decayed for want of plaistering, whereby the timber is rotted, and even, as it appears by a case (f) instanced by Mr. Thomas, in one of his notes to *Coke's First Institute*, although the timber be not thereby rotted. So also, it will be waste, if the walls are suffered to be decayed, though the timber was in decay at the commencement of the lease (g).

Other ex-  
amples of  
waste.

So, according to a case in *Rolle's Reports* (h), it will be waste, if the lessee of a house pulls down the house and rebuilds it less than before; or if he rebuilds it larger to the prejudice of the lessor, for it is more charge to repair. Or, if he alters the house to the lessor's prejudice; as if he converts a parlour into a stable (i); or if he converts two rooms into one; for if it might be for the lessor's advantage, it may be abewn

(a) 1st Inst. orig. edit. fo. 53 a.—  
Thomas's edit. vol. iii. p. 233.

(b) Hale's MSS.—Hargrave, n. 3.  
fo. 53 a.

(c) Ibid.

(d) 1st Inst. fo. 53 a.

(e) 1st Inst. fo. 53 a.

(f) Rolle's Rep. vol. ii. p. 817.

(g) Comyn's Digest, tit. Waste.

(h) Vol. ii. p. 815.

(i) Kel. p. 39.

to the contrary. Or if he converts one brew-house of 120*l.* a year into two or more dwelling-houses, which let for 200*l.* a year, it is waste in law, as shewn in the case of *Cole v. Green* (a), (which as a case of great importance in the doctrine of waste, is much worthy of attention from the student) because of the alteration of the nature of the thing, and of the evidence.

Also, if glass windows (though glazed by the tenant himself) be broken down, or carried away, it is waste, for the glass is part of his house. And so it is of wainscot, benches, doors, windows, furnaces and the like, annexed or fixed to the house, either by him in the reversion, or the tenant.

It is said, that a tenant for years during his term may take away chimney-pieces and even wainscot, if put up by himself (b). It will be well for the student to observe there the distinction taken as to fixtures between the several cases of heir and executor, of tenant for life and him in remainder, and of landlord and tenant (c).

The old rule, says Mr. *J. H. Thomas* (d), that whatever is annexed to the freehold, becomes part of it, and cannot be removed without doing waste (e), has been relaxed in later times, upon motives of public policy, as between two descriptions of persons, that is, landlord and tenant, and tenant for life or in tail, and the remainder-man or reversioner. 1st, As between landlord and tenant, it is now admitted, that the latter may, during the term, take away all such chimney-pieces, wainscot, &c. and all such things necessary for trade, as brewing vessels, coppers, fire-engines, cyder-mills &c. (f)

(a) Vide Appendix, No. XXXVI. *Herlakenden's case*, Co. Rep. part iv.

(b) Atk. Ch. Rep. vol. i. p. 477; 64 a. *Day v. Bisbitch*, Cro. Eliz. 374. and Ib. vol. iii. p. 13. *Lord Darley v. Asquith*, Hob. 234.

(c) Herg. note b, to Coke's 1st Inst. *Cave v. Cave*, Vern. vol. ii. p. 508. Catting v. Tuffnell, Bull. N. P. 34.

(d) In his edition of Coke's 1st Inst. (f) Ex parte Quincey, Atk. vol. i. vol. iii. p. 234, note 3. p. 477. *Dudley v. Ward*, Ambl. 113.

(e) Supra, 53 a. Bro. Waste, pl. 104. 143. *Cooke's case*, Moor, 177. Bull. N. P. 34.

as he has himself had put up or erected (*a*). But if he remove them *after the term*, he will be a trespasser (*b*). 2d. As between tenant for life or in tail, and the remainder-man or reversioner, it is also admitted, that the former may remove fire-engines, cyder-mills, coppers &c. which he has erected, and thereby not only enjoys the profits of the estate, but likewise carries on a *species of trade*. And if he does not remove them in his life-time, they go to his personal representative (*c*). The rule however still holds between the heir and executor (*d*); for though in an action of trover by an executor against an heir for a cyder-mill, tried at Worcester, before Lord Chief Baron Gilbert, his Lordship was of opinion, that it was personal estate, and directed the jury to find for the executor; yet Lord Mansfield has observed, that that case, in all probability, turned upon a custom: and, it seems to be now fully established, that where no circumstance of this kind arises, the rule will still hold in favor of the heir (*e*). It may be further observed, that there appears to be a distinction between annexations to the freehold of buildings for the purposes of trade, and those made for the purposes of agriculture and better enjoying the immediate profits of the land, in favor of the tenant's right to remove the former (*f*); in which case it was determined, that a tenant in agriculture, who had erected at his own expense, and for the more necessary and convenient occupation of his farm, a beast-house, carpenter's shop, cart-house, pump-house and fold-yard, which buildings were of brick and mortar, and tiled, and let into the ground, could not remove the same, though during his term, and although he thereby left the premises in the same state as when he entered. But with respect to annexations to the freehold of that nature for the purposes of trade, the rule is in favor of the right of the tenant; that is, where the super-incumbent build-

(a) Poole's case, Salk. vol. i. p. 368.

(b) Ibid.

(c) Lawton v. Lawton, Atk. vol. iii. p. 13; and this Treatise, ante, p. 117, et seq. and 144.

(d) Poole's case, supra. Ex parte Quincey, ante, pp. 130, 143, and 173. Dudley v. Ward, Bull. N. P. 34.

(e) Lawton v. Lawton, Hen. Bl. vol. i. p. 259, n. Atk. vol. iii. p. 16, n. East's Rep. vol. iii. p. 53.

(f) See the case of Elwes v. Maw, East's Rep. vol. iii. p. 38; and this Treatise, ante, p. 137, et seq. and p. 149.

is erected as a mere accessory to a personal chattel, as an engine: but where it is accessory to the realty, it cannot be removed.

Though there be no timber growing upon the ground, says *Lord Coke* (a), yet the tenant at his peril must keep the uses from wasting. This is another proof, if any were wanting, among many, of the care which our ancestors took, for *Lord Coke* himself (b) says the law doth favor, the supportation of houses of habitation and use for mankind. This great lawyer, appears to have had some knowledge of and love for architecture, which he probably acquired from his illustrious contemporary *Sir Henry Wotton*, for in his discourses we often receive phrases and comparisons drawn from that art; for instance, the epilogue to his Fourth Institute, wherein he says, "and for that we have broken the ice, and out of our industry and observation, framed this high and honorable building of the jurisdiction of Courts, without the help or assistance of any that hath written of this argument before," he will heartily desire the wise hearted and expert *builder* (just being *architectonica virtus*) to amend both the method or formity, and the structure itself, wherein they shall find they want of windows, or sufficient lights, or other deficiency in the architecture whatsoever. And we will conclude with the maxim of that great lawyer and sage of the law (*Edmund Norden*), which we have heard him often say, "Blessed be the amending hand."

So also in his Third Institute he has devoted a considerable portion of a chapter (c) to the subject, which he has treated with his usual learning and acuteness. As the subject is so pertinent to the matter before us, and as his Third and Fourth Institutes are not in every general or architectural library, we have given the paper, as very useful and curious, in the appendix (d).

(a) Co. 1st Inst. fo. 53 a.

(b) 4th Inst.

(c) Co. 3d Inst. cap. xviii. "Of

Buildings."

(d) App. No. XXXVIII.



Burning a house formerly waste.

Burning the house, by negligence or mischance was, in Lord *Coke's* time, considered waste; but now by the statute of the 6th of Anne, as more fully discussed in page 205 of this Treatise, no action will lie against the tenant.

Building a new house, in some cases waste.

If a tenant build a new house, says Lord *Coke*, and cites several statutes and other authorities (*a*); and if it fall down by tempest, or be burnt by lightning, or prostrated by enemies or the like, without default of the tenant, or was ruinous at his coming in, and fall down, the tenant may build the same again, with such materials as remain, and with other timber, which he may take growing on the ground for his habitation, but he must not make the house larger than it was (*b*). If the house be destroyed by tempest, the tenant must in convenient time repair it (*c*).

If the tenant, continues Lord *Coke* (*d*), do or suffer waste to be done in houses, yet if he repair them before any action be brought, there lieth no action of waste against him, but he cannot plead, *Quod non fecit vastum*, but the special manner. A wall uncovered, he says, when the tenant cometh in, is no waste, if it be suffered to decay.

General rule of law, as to waste.

It is a general rule, says Mr. *Thomas*, in a note to his New and excellent Arrangement of the First Institute (*e*), that waste which ensues from the act of God, is excusable; so that if a house falls in consequence of a tempest, lightning &c. the tenant shall be excused in an action of waste. But where a house is uncovered by tempest, the tenant is bound to repair it within a reasonable time, before the timber grows rotten (*f*).

(a) 42 E. 3. 31.—49 E. 3. 2.—9 H. 6. 53.—17 E. 2. Wast. 118. Hob. 234. Rolle's Abr. vol. ii. pp. 814, 815, 820. Ib. vol. i. p. 507. cont. Mo. 7.

(b) *Coke's* 4th Inst. fo. 63. *Herlakenden's case*, 43 E. 3. 6.—26 E. 3. 76.—11 H. 4. 32.—12 H. 4. 32.—12 H. 4. 5.—22 H. 6. 18.—19 E. 3. Wast. 30.

(c) 12 H. 4. 5. Judge Hale's MSS.

(d) Co. 1st. Inst. fo. 53 a.

(e) Vol. iii. book ii. ch. liii. p. 237. note F.

(f) Rolle's Abr. vol. ii. page 820.—Brooke's Abr. tit. Condition, p. 40.—*Coke's Rep.* part x. fo. 159 b. Co. 2d Inst. fo. 303. Com. Digest, vol. vi. p. 525.

So if the banks of a river are destroyed by a sudden flood, it is not waste; but it has been determined, that if the banks on such a River as the Trent, for instance, are unrepaired, it is waste; because the Trent is not so violent, but that the lessee, by his industry, might well enough preserve the banks, and make the water run within its bounds (*a*).

Lord Coke, says again (*b*), that if the tenant convert arable land into wood, or *à converso*, or meadow into arable, it is waste, for it changeth not only the course of his husbandry, but the proof of his evidence. And this rule, says Mr. Thomas, in a note on this passage, holds, although the conversion be for the advantage of the lessor (*c*). So in a late case (*d*) it was held, that in an action of waste, on the statute of Gloucester, against a tenant for years for converting three closes of meadows into garden-ground, if the jury give only one farthing damages for each close, the Court will give the defendant leave to enter up judgment for himself. But it is to be remembered, says Mr. Thomas (*e*), that the decision in this case was grounded upon the peculiar nature of actions of waste, whereby the thing wasted is to be recovered as well as damages; and refers us to the case of *Pindar v. Wadsworth* (*f*).

Conversion of property sometimes waste.

In actions of waste the thing wasted is recovered as well as damages.

By several ancient statutes (*g*) it is enacted, that digging for gravel, lime, clay, brick-earth, stone or the like, or for mines of metal, coal or the like, hidden in the earth and were open when the tenant came in, is waste, but the tenant may dig for gravel or clay for the reparation of the house, as well as he may take convenient timber trees.

(*a*) Mod. Rep. p. 69, pl. 187. Cru. Dig. pp. 68, 69.

(*b*) Co. 1st Inst. fo. 53 b.

(*c*) Dyer's Rep. fo. 35 b. Hobart's Rep. p. 234. Leonard's Rep. p. 175.

(*d*) The Governors, &c. of Harrow School v. Anderton, Bosan. & Pull. vol. ii. p. 86.

(*e*) Thomas's Coke, 1st. Inst. vol. iii. p. 241, n. L.

(*f*) East's Rep. vol. ii. p. 160.

(*g*) 22 H. 6. 18 b.—9 E. 4. 35.—41 E. 3. Wast. 82.—17 E. 3. 7.—9 H. 6. 66.—2 H. 7. 24. Fitz. Nat. Br. 59, n. and 149 c. 20 E. 3. Wast. 32. Rolle's Abr. vol. ii. pp. 815, 816.

Waste properly, says *Coke* (*a*), is in houses, gardens and timber trees (*b*); and if the tenant cut down timber trees, or such, as by the aforesaid rule of building, are accounted timber, it is also *waste*; and if he suffers the young germins to be destroyed, it is *destruction* (*c*).

**Double waste.** By sundry ancient statutes (*d*) cited by Lord *Coke* in his First Institute (*e*), if the tenant suffer the houses to be wasted, and then fell timber to repair the same, it is double waste.

By other authorities, also cited by Lord *Coke* (*f*), the tenant may take sufficient wood to repair the walls, pales, fences, hedges and ditches, as he found them, but he can make no new; and he may take sufficient plough-bote, fire-bote and other house-bote.

He also says, if a tenant cutteth down trees for reparations and selleth them, and after buyeth them again, and employs them about necessary reparations, yet it is waste by the vendition: he cannot sell trees, and with the money cover the house: But in a case, which I have referred to in Chapter II. page 159, of *Withers v. The Dean and Chapter of Winchester and others*, Lord (Chancellor) *Eldon*, held, that landlords may sell trees growing on the land of their tenants and apply the proceeds instead of the timber to the purposes of the covenants.

In many cases, continues the same great authority, a tenant for life or years, may fell down timber to make reparations, albeit he be not compellable thereunto, and shall not be pu-

(*a*) 1st Inst. fo. 53 a.

(*b*) His Lordship, with that care that I have before mentioned, enumerates oak, ash and elm, as being timber trees in all places, and in countries where timber is scanty, beech and any other trees that are converted by the custom of the country, to

building for the habitation of man, or the like, are all accounted timber.

(*c*) 22 H. 6. 12 a.—9 H. 6. 1. 66.—11 H. 6. 1. Fitz. Nat. Br. 59 m.

(*d*) 44 E. 3. 44.—20 E. 3. Wast. 32. Fitz. N. Br. 59 b. 19 E. 3. Wast. 30.

(*e*) Fo. 53 b.

(*f*) Ibid.

nished for the same in any action of waste. As if a house be ruinous at the time the lease be made, if the lessee suffer the house to fall down he is not punishable, for he is not bound by law to repair the house in that case (a). And yet if he cut down timber upon the ground so let, and repair it, he may well justify it; and the reason is, *that the law doth favor the supportation or maintenance of houses of habitation for mankind*. But by the statutes of the 4th Edw. 3. Wast. 22. and the 44th Eliz. 3. 21. though there be no timber growing on the estate, yet the tenant, at his peril, must keep the houses from wasting (b). And therefore if two or more joint-tenants or tenants in common be of a house of habitation, and the one will not repair the house, the other shall have by the law a writ *de reparatione faciendâ*, and the writ saith, *ad sustentationem ejusdem domûs teneantur* (c).

So it is if the lessor by his covenant undertaketh to repair the houses, yet the lessee (if the lessor doth it not) may with the timber growing upon the ground repair it, though he be not compellable thereto. But, says Mr. *Hargrave*, in a note on this passage, if the lessee covenants to repair and doth not repair, waste will not lie; and cites as authorities Sir *Matthew Hale's* Manuscripts, 29 E. 3. 43. 21 H. 6, 6. and *Dyer's Reports*, p. 198.

A lessor agreeing to repair, and will not do it; the legal remedy.

In the same manner, continues Lord *Coke*, if a man make a lease of a house and land without impeachment of waste for the house, yet may the lessee with the timber upon the ground repair the house, though he may utterly waste it, if he will; and so in many other cases.

Concerning the expression, "without impeachment of waste" Mr. *Thomas* explains it in his edition of *Coke* (d) as follows:

Explanation of the term,

(a) Although he is not bound by law to repair in such a case, yet if he covenant to repair, he must do so, for covenants overcome the law, as is observed in page 169, of this Treatise, *modus et conventio vincunt legem*.

(b) Liber Assiz. 38. 1.

(c) For copies of these writs, vide Fitzherbert's *Natura Brevium*.

(d) Vol. iii. p. 251, note B 1.

"*Sauns impeachment de wast.*" is *Littleton's* expression, and *absque impetitione vasti*, without impeachment of waste, those of *Coke*, on which he has commented.

Without impeachment of waste.

Where estates are limited by express words, this clause, "without impeachment of waste," is usually inserted in the instrument creating the estate. Formerly it was held, that it only exempted the tenant for life from the penalties of the statute of Marlbridge, and did not give the property of the thing wasted. But it was afterwards determined, that these words also give the tenant for life power to cut down all sorts of timber trees, and to convert them to his own use (*a*); and also, that where timber, parcel of a building, or timber trees were blown down, they became the property of the tenant for life (*b*). But this clause does not enable the tenant for life to commit waste maliciously, by pulling down houses, or cutting down timber which serves for ornament or shelter, or which is not fit to be felled; for in that case an injunction will issue to restrain his legal right (*c*).

If a testator, continues Mr. *Thomas*, or author of the deed creating the tenancy for life, has planted for ornament, though his taste be very disgusting, yet the taste of a testator, like his will, is binding, and the Court will not permit a tenant for life to destroy plantations so intended for ornament. The principle has been extended from ornament of the house to out-houses and grounds, and to plantations, vistas, avenues, and to all the rides about the estate for ten miles round, but it is not a sufficient ground for an injunction that the trees are ornamental, not to the estate upon which they grow, but to the surround-

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(*a*) *Lewis Bowler's case*, Co. Rep. Bacon's Abr. Gwillim's edit. vol. vii. part xi. p. 79. Ves. Rep. vol. i. p. 265. p. 289. Atk. Ch. Rep. vol. iii. p. 215.

(*b*) *Pyne v. Don*, Term Rep. vol. i. p. 55. Rolt v. Lord Somerville, Eq. Ca. Abr. vol. ii. p. 279. *Aston v. Aston*, Ves. Rep. vol. i. p. 264. *Strathmore v.*

(*c*) *Vane v. Lord Bernard*, Vern. Rep. vol. ii. p. 738. Term Rep. vol. i. p. 55, n. *Pocklington v. Pocklington*, Bowes, Brown's Chan. Cases, vol. ii. p. 88.

ing country (a). And it has been determined, that it is not waste to cut timber, where necessary for the growth of the underwood in which it is situated (b); neither is it waste to cut timber merely ornamental, unless it was planted and growing for ornament, such as *vistas* and *avenues* (c). This principle, however does not, it seems, extend to a wood covering *thirty acres* (d); but it does extend to prevent the cutting down of trees planted for the purpose of excluding objects from view (e). And equity will not only restrain a tenant for life from doing further waste, but will direct an account of the waste done, and that the money produced by such waste be laid up for the benefit of those who succeed to the estate (f). And as at law if legal waste be committed, and the party dies, an action for money had and received, lies against his representatives (g), so upon the same principle, equity, in similar cases of waste, the party must, through his representatives, refund in respect of the wrong which he has done. This doctrine was held by Sir *Thomas Plumer*, when Vice Chancellor, in the case of *The Marquess of Lansdowne v. The Marchioness of*

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(a) See the case of the Marquess of Downshire v. Lady Sanderson, Ves. Rep. vol. vi. p. 110.

(b) Burgess v. Lambe, Ves. Rep. vol. xvi. p. 179. Knight v. Duplessis, Ib. vol. ii. p. 361.

(c) Burgess v. Lambe, Ves. Rep. vol. xvi. p. 183.

(d) Ibid. p. 183.

(e) Day v. Merry, Ves. Rep. vol. xvi. p. 375.

(f) Maddocks's Rep. vol. i. p. 136. Williams v. The Duke of Bolton, Peere Williams Rep. vol. iii. p. 268, n.

(g) According to Lord Coke's Second Institute, though the term goes to his executor or administrator. But though the executor shall not be chargeable, says Mr. Thomas, in an-

other note to the First Institute\*, for the injury done by his testator in cutting down another man's trees, because *actio personalis moritur cum persona*; yet he shall be liable, in an action for money had and received, for the benefit arising to his testator from the value or sale of the trees. See the cases of Hamblly v. Trot, Cowp. Rep. p. 376. and the Marquess of Lansdowne v. The Dowager Marchioness of Lansdowne, Maddocks's Rep. vol. i. p. 139. It is now usual to insert in leases express covenants to repair, upon breach whereof by the lessee in his life-time, an action of covenant will lie against his executors or administrators.

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\* Vol. iii. page 244, note O.

preceding note. In which case the representatives of a deceased tenant for life, for an account of waste, for an account of waste, for an account of waste, by him, and for relief, was overruled by the doctrine as to *equitable waste*, extended (b), a tenant for life unimpaired liberty to cut timber generally, treated in the same manner, independent of the effect of the law in the place (c); there being no such law in the place made by *Philip le Belle*, King of France, in the thirteenth century, which made it penal to cut a tree, *pour sa beauté* (d).

As given by the words "without impeachment of waste," annexed to the privity of estate, and if the estate is confirmed or otherwise, it is gone (e). And if a lessee, without impeachment of waste, says the law authority (f), is not good, if it is not by deed; nor, if it is not by the same deed by which he leases; for, by the deed it amounts to a covenant (g). Where the clause "without impeachment of waste" is restrained by the words "except voluntary waste," the tenant is punishable for wilful waste, and has no interest in the timber, otherwise than the use and shade and necessary botes (h). And where estates are devised with partial powers of committing waste, the Court will interpose to restrain the devisees from abusing such powers (i). So in case of tenant for life, without power of committing waste, remainder to another for life, without impeachment of waste, remainder in fee; the Court will not suffer an agreement between the two tenants for life to commit waste, to take place against the remainder-man; before the

(a) See the case of *The Bishop of Winchester v. Knight, Peere Williams*, vol. i. p. 407.

(b) See *Vesey's Reports*, vol. xvi. p. 185.

(c) *Ibid.*

(d) *Madd. Ch. Rep.* vol. i. p. 117.

(e) *Coke's Rep.* part xi. fo. 83 b.

(f) *Co. 2d Inst.* fo. 146.

(g) *Rolle's Rep.* vol. i. p. 183.

(h) *Per Lord Hardwicke, Dickinson's Chan. Reports*, p. 188.

(i) *Hewitt v. Hewitt*, *Ambl. Rep.* p. 508. *Chamberlain v. Dummer*, *Bro. Ch. Rep.* vol. i. p. 66. *Ibid.* vol. iii. p. 549.

time comes when the second tenant for life's power commences (a).

According to *Blackstone* (b), we find, that by the feudal law, feuds being granted for life only, that the rule, that all feudatories were punishable for waste was general for all vassals or feudatories (c). But in our ancient common law the rule was by no means so large; for not only he that was seised of an estate of inheritance might do as he pleased with it, but also waste was not punishable in any tenant, save only three persons; namely, guardian in chivalry, tenant in dower, and tenant by the curtesy (d); and not tenant for life or years. And the reason of the diversity was, that the estate of the three former was created by the act of the law itself, which therefore gave a remedy against them; but tenant for life, or for years, came in by the demise and lease of the owner of the fee, and therefore he might have provided against the committing of waste by his lessee; and if he did not, it was his own default. But in favor of the owners of the inheritance, the statutes of Marlbridge (e) and of Gloucester (f) provided that the writ of waste shall not only lie against tenants by the law of England, (or curtesy) and those in dower, but against any farmer or other that holds in any manner for life or years. So that, for above five hundred years past, all tenants merely for life, or for any less estate, have been punishable or liable to be impeached for waste, both voluntary and permissive; unless their leases be made, as sometimes they are, without impeachment of waste, *absque impetitione vasti*; that is, with a provision or protection that no man shall sue them for waste committed.

Who are liable  
to punishment  
for waste.

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(a) See the cases of *Robinson v. Litton*, Atk. Ch. Rep. vol. iii. p. 210. *Garth v. Cotton*, ib. p. 755.

(b) Com. vol. ii. p. 282.

(c) "Si vasallus feudum dissipaverit, aut insigni detrimento deterius fecerit, privabitur." Wright, p. 44.

(d) It was however a doubt, says

*Blackstone*, whether waste was punishable at the common law in tenant by the curtesy; and cites, in corroboration, Registr. p. 72. Bro. Abr.

tit. Waste, p. 88. Co. 2d Inst. fo. 301.

(e) 52 Hen. 3. c. 23.

(f) 6 Edw. 1. c. 5.



This clause in a lease, says *Blackstone* (a), enables the tenant to cut down trees, open mines and the like; but it is held not to extend to allow *destructive* or *malicious* waste, such as cutting down timber which serves for the shelter or ornament of the estate (b).

A tenant in tail after possibility of issue extinct is not impeachable for waste; because, says *Blackstone* (c), his estate was at its creation an estate of inheritance, and so not within the statutes (d). Neither does an action of waste lie *for the debtor* against tenant by statute, recognizance, or *elegit*; because against them the debtor may set off the damages in account: but it seems reasonable that it should lie *for the reversioner*, expectant on the determination of the debtor's own estate, or of those estates derived from the debtor (e).

The punishment is forfeiture and damages.

The punishment for waste committed was by common law and the statute of Marlbridge only single damages (f); except in the case of a guardian, who had forfeited his wardship (g) by the provisions of the Great Charter: but the statute of Gloucester directs, that the other four species of tenants should lose and forfeit the place wherein the waste is committed, and also treble damages to him that hath the inheritance.

The expression of the statute is, "he shall forfeit the *thing* which he hath wasted," and it has been determined (h), that under these words the *place* is also included. And if waste be done *sparsim*, or here and there, all over a wood, the whole

(a) In a note to the foregoing passage, book ii. chap. xviii.

(b) See the cases of *Vane v. Lord Bernard*, for committing waste by beginning to pull down Raby Castle, *Vern. Rep.* vol. ii. p. 738. *Packington v. Packington*, *Bac. Abr.* vol. v. p. 491. *Rolt v. Lord Somerville*, *Eq. Ca. Abr.* vol. ii. p. 759. *Aston v. Aston*, *Viner*, vol. i. p. 264. *Peers v.*

*Peers*, *ib.* vol. i. p. 591. *Ark. Rep.* vol. ii. p. 283.

(c) *Blackst. Com.* book ii. ch. xviii.

(d) *Co. 1st Inst.* fo. 27. *Rolle's Ab.* vol. ii. fo. 826. 828.

(e) *Fitz. Nat. Brev.* fo. 58.

(f) *Co. 2d Inst.* fo. 146.

(g) *Ibid.* 300.

(h) *Ibid.* 303.

wood shall be recovered; or if in several rooms of a house (a) the whole house shall be forfeited; because it is impracticable for the reversioner to enjoy only the identical places wasted, when lying interspersed with the other. But if waste be done in only one end of a wood, or in one room of a house (if that can be conveniently separated from the rest), that part only (b) is the *locus vastatus*, or thing wasted, and that only shall be forfeited to the reversioner.

It is provided also by the same statute (c) which enumerates the several tenants against whom an action of waste is maintainable, "that a man from henceforth shall have a writ of waste in the Chancery against him that holdeth by the law of England, or otherwise for term of life, or for term of years, or a woman in dower. And he that which shall be attainted of waste, shall lose the thing which he hath wasted, and moreover shall recompense thrice so much as the waste shall be taxed at. And for waste made in the time of wardship, it shall be done as is contained in the Great Charter; and where it is contained in the Great Charter, that he which did waste during the custody, shall lose the wardship, it is agreed that he shall recompense the heir his damages for the waste, if so be that the wardship lost do not amount to the value of the damages before the age of the heir of the same wardship.

Other provisions of this statute as to waste.

The real action of waste, says Sir William D. Evans, in his arranged Collection of Statutes (d), has so entirely fallen into disuse, that the case of the Governors of *Harrow School v. Anderson* (e) is probably the only instance of it remembered by lawyers now living. The action on the case, he says, in the nature of an action of waste, is now commonly substituted for the ancient remedy, and will lie between persons between whom the proper action of waste is not maintainable; but in the case

Disuse of the action of waste.

(a) Co. 1st Inst. fo. 54 a. 371.

(b) Co. 2d Inst. fo. 304.

(c) Statute of Gloucester, 6 Edw. 1.

(d) Note to the before-mentioned statute, vol. i. p. 193.

(e) Bos. & Pul. vol. ii. p. 86.

of *Gibson v. Wells* (a), which was an action on the case, in the nature of the ancient writ of waste (b) against a person who is stated in the Report to have been *tenant at will*, to the plaintiff, but who was described in the declaration as holding "for a certain term not yet determined." The injuries proved amounted only to *permissive* waste, and Sir *James Mansfield*, Chief Justice of the Common Pleas, nonsuited the plaintiff, saying, "that although an action on the case might be maintained against a *tenant at will*, yet he had never known an instance of such an action being maintained for *permissive* waste only. And on a motion for a new trial, his Lordship added, that an action on the case might be maintained for *wilful* waste, but that at common law, if any part of the premises were suffered to be dilapidated or wasted, it amounted to *permissive* waste, and if that action were maintainable, such an action might be brought against a *tenant at will*, who omitted to repair a broken window."

Writs of waste may be still necessary.

On this case Sir *William D. Evans* (c) observes, that if this authority is admitted to be law, it may render it still necessary to resort to the former proceeding.

Injunctions in equity an effectual remedy.

A more effectual remedy, says the same learned commentator on the Statutes (d), is in many cases attainable by injunctions in equity. In the before-mentioned case of *Harrow School v. Anderton* (e) the Court of Common Pleas, upon the authorities there cited, gave judgment for the defendant, on account of the small amount of the damages, recovered by the plaintiff.

Action of waste will not lie against a tenant for years for permissive waste.

In another similar case, *Herne v. Benbow* (f), the defendant was a *tenant for years*, and yet the decision was given that an action on the case cannot be maintained against a *tenant for*

(a) Bos. & Pul. vol. ii. p. 86. New Rep. vol. i. p. 290.

(b) For the nature and power of the ancient writ of waste, see a subsequent part of this work.

(c) In his before-mentioned note to

the provisions of the Statute of Gloucester.

(d) *Ibid.*

(e) *Ante*, page 255, note (e).

(f) Taunt. Rep. vol. iv. p. 764.

years, for permissive waste. It is a solitary case, and may not be viewed as a precedent, as the rule there laid down, "that an action on the case does not lie against a tenant for permissive waste," is not borne out by the authority cited in support of it (a) which only shews, as does Sir *James Mansfield's* decision, that such an action cannot be maintained against a tenant at will.

In this case (*Herne v. Benbow*) the plaintiff declared in case, and alleged that certain buildings in the defendant's occupation, were ruinous, prostrate, and in decay, for want of needful and necessary reparations. The defendant suffered judgment to go by default, and very small damages were given. On setting aside the inquisition, the Court said, that if that action could be maintained, a lessor might declare in case for not occupying in an husbandlike manner, which could not be. That the facts alleged were permissive waste, for which an action on the case could not lie; and *The Countess of Shrewsbury's case* was cited in support of it.

(1)

In another action of a similar nature, *Jones v. Hill* (b), it appeared there to be held, that an action on the case would not lie against a lessee for years for permissive waste. The leading features of this case are as follow; namely, that an action on the case in the nature of waste, cannot be supported against the assignee of a lease, in which the lessee had covenanted "from time to time, and at all times during the term, when need should require, sufficiently to repair the premises, with all necessary reparations, and to yield up the same so well-repaired at the end of the term, in as good condition as the same should be in when finished, under the direction of *John Middleton*," the lessor's surveyor; upon a breach that the defendant suffered the premises to become and be in decay and ruinous during a large part of the term, and after

Action on the case will not lie against lessee for years for permissive waste.

(a) The before-mentioned Case of *The Countess of Shrewsbury*, ante, J. B. Moore's Rep. vol. i. p. 100. page 209.

the term wrongfully yielded them up in much worse order and condition than when the same were finished under the direction of the said *John Middleton*. From which it appears that an action on the case will not lie against a lessee for years for permissive waste.

Plaintiff's case.

First count.

The plaintiff declared that the defendant had held and enjoyed divers messuages and two small rooms as tenant thereof to the plaintiff, to wit, for the residue of a term ending 24th of June, 1815, upon certain terms, viz. that the defendant during his tenancy, at his own costs, would from time to time and at all times, when, where, and as often as need or occasion should be or require, well and sufficiently repair, uphold, maintain, amend and keep the premises, and every part, in, by and with all and all manner of needful and necessary reparations and amendments, and the same so well upheld &c. at the end, or other sooner determination of the term, which should first happen, would peaceably yield up to the plaintiff in as good plight and condition as the same were in, when finished under the direction of Mr. *John Middleton*; but that the defendant, not regarding his duty in that behalf, but contriving to injure the plaintiff, whilst the same were in the defendant's possession as tenant to the plaintiff, to wit, on the 24th of June, 1810, and on divers other subsequent days before 24th June, 1815, wrongfully suffered the messuages and two small rooms to be, become and continue, and the same during all that period, and still were ruinous, prostrate, fallen down and in great decay, for want of needful and necessary reparations and amending &c. and afterwards, on that day, the defendant wrongfully yielded up to the plaintiff the premises, so ruinous and in much worse order and condition than when the same were finished under the direction of *Middleton*.

Second count.

The plaintiff in his second count stated, that the defendant had held divers messuages and two small rooms, as tenant thereof to the plaintiff, viz. upon certain terms, that the defendant, during his tenancy, at his own costs, would from time to time, and at all times when, where and as often as need or occasion should be or require, well and sufficiently repair, up-

hold, maintain, amend and keep the premises in, by and with all and all manner of needful and necessary reparations and amendments; and assigned for breach, that the defendant, not regarding his duty, but wrongfully intending to injure the plaintiff, whilst the same were in the defendant's possession, as tenant thereof to the plaintiff, on 24th June, 1810, and other days, wrongfully permitted the messuages and two small rooms to be, become and continue, and the same during all that period, and still were ruinous, prostrate, fallen down and in great decay for want of needful and necessary reparations, and amending, maintaining, repairing and upholding the same.

The plaintiff in his third count averred, that the defendant held the premises as tenant to the plaintiff, upon the terms that the defendant should, whilst he so continued tenant, sufficiently repair, maintain, support and keep them; and he averred, that the defendant was and continued his tenant thereof, from 24th June, 1810, until 24th June, 1815; but that the defendant, not regarding his duty, did not, nor would, whilst he so continued tenant, sufficiently repair the premises, but had neglected to do so, and, on the contrary, during all that term had suffered and permitted the premises to be and remain ruinous, prostrate, fallen down and in great decay, for want of needful and necessary reparations, maintaining and upholding the same.

Third count.

The defendant pleaded the general issue.

Defendant's plea.

This cause was tried at the Surrey Lent Assizes, 1817, before Mr. Justice Dallas. It appeared that the defendant had been tenant of the premises under a lease to *Rotton* for twenty-one years from 24th June, 1794, wherein the lessor covenanted that he would at his own costs, cause the several alterations and improvements then going on under the direction of Mr. *John Middleton*, with respect to the basement and other stories, and drains of the premises, to be completed before 24th June then next, and the lessee covenanted that he, his executors, administrators and assigns, or some or one of them, would at his or some or one of their own costs, from time to time, and at

Facts as appeared on the trial.

all times during the term, when, where and as often as need or occasion should be or require, well and sufficiently repair, uphold, maintain, amend and keep the premises and every part, in, by, and with all and all manner of needful and necessary reparations and amendments whatsoever, and the same so well and sufficiently upheld, sustained, maintained, repaired, paved, amended and kept, at the end or other sooner determination of that demise, which should first happen, would peaceably yield up to the lessor, in as good plight and condition as the same should be in, when finished, under the direction of Mr. *John Middleton*, agreeable to the lessor's covenant therein contained (reasonable use and wear excepted.)

Objections for  
the defendant.

For the defendant it was objected, that an action upon the case could not be maintained for permissive waste, upon which ground the Judge (*Dallas*), directed a nonsuit, with liberty to move to set it aside, if the Court should be of opinion that the action were maintainable.

Mr. Serjeant *Vaughan* now moved to set aside the nonsuit and have a new trial. The *dictum* of Chief Justice, (*Sir James Mansfield*), in the case of *Herne v. Benbow* (a); that action on the case lies not, for permissive waste was merely *obiter*, and not the point in the case. By the statute of Gloucester, a tenant for years, as for half a year, or a year (b), is liable for waste, and though he be assignee of the term (c). And he is liable as well for permissive as for commissive waste. And Lord *Coke*, in his reading on that statute, saith, he that suffereth a house to be out of repair, is guilty of waste. So, "If the tenant suffer the houses to be wasted, and then fell down timber to repair the same, this is a double waste (d)." So, "If a tenant permit a chamber to be in decay for default of plaistering, whereby the great timber becomes rotten, and the chamber becomes very foul and filthy, an action of waste lies, for it (e). So affirmed in error." So, "If a lessee per-

(a) Ante, page 256.

(b) Co. 3d Inst. p. 302.

(c) Ibid.

(d) Co. 1st Inst. p. 53 b.

(e) Rol. Abr. vol. ii. p. 816, Waste, pl. 36.

mit the walls to be in decay for default of daubing, whereby the timber becomes rotten, an action of waste lies. *Newell v. Downing* (a),” and, “between Sir John Corbett and Sir James Stonehouse (b), admitted and adjudged, that an action of waste lies for permitting the walls of messuages to be in decay and unrepaired for default of daubing and plaistering; whereupon ‘no waste done,’ was pleaded; and this also was admitted upon a writ of error thereon, in the King’s Bench.” And the cases where it has been held that an action on the case does not lie for permissive waste, must be intended of actions against tenants at will in the true and strict legal meaning of the word, not of actions against tenants for years, or from year to year. The authorities that support this distinction, said Mr. Serjeant *Vaughan*, are collected by the deep learning of the editor of *Saunders* (c). And that most able pleader gives a precedent (d) of a declaration for the very action on the case for permissive waste. In *Kenliside v. Thornton* (e), it was held, that the contract does not deprive the lessor of his remedy for waste. And though in *Gibson v. Wells* (f), it is put broadly in the margin, that such action does not lie for permissive waste, yet the case does not support the proposition to the general extent, for it is expressly therein stated, that the defendant was merely tenant at will.

Chief Justice, Sir *Vicary Gibbs*, “I do not say whether permissive waste may or may not lie, but it is impossible that it should be waste, to omit to put the premises into such repair as A. B. had put them into. Waste can only lie for that which would be waste if there were no stipulation, it could not be waste to leave the premises in a worse condition than A. B. had put them into. I think that is certainly not waste.”

Chief Justice  
Gibbs's deci-  
sion.

The rest of the Court concurred in refusing the rule (g).

Rule refused.

(a) *Rel. Abr.* vol. ii. p. 816, *Wast.* pl. 37.

(b) *Ibid.*

(c) *Wms. Saund.* vol. i. 323 a, n. 7, and vol. ii. p. 252, n. 7.

(d) *Wms. Saund.* vol. ii. 252 c, n. 7.

(e) *Bla. Rep.* vol. ii. p. 4.

(f) *Hos. & Pul. New Rep.* vol. i. p. 290; and ante, p. 256.

(g) Mr. Taunton says, in a note to this case, that the reporter did not collect whether the Court expressed



**Writ of waste.** A writ of waste, says Sir William Blackstone . . . is an action, partly founded on the common law . . . before observed (b), upon the statute of Gloucester . . . brought by him who hath the immediate estate . . . in reversion or remainder, against the tenant for life, or dower, tenant by the curtesy, or tenant in tail.

This action is also maintainable, in virtue of the statute of Westminster (c), by one tenant in common or inheritance against another, who makes waste in the land holden in common. The words of the statute are . . . two or more do hold wood, turf-land or fishing, or other things in common, wherein none knoweth in what part of them do waste against the mind of the other. . . . lie by a writ of waste; and when it is come to the trial the defendant shall choose either to take his part in the land by the sheriff, and by the view, oath and assent of his neighbours sworn and tried for the same intent . . . or to grant to take nothing from henceforth in the same wood, or land and such other, but as his partner will take; and if he do choose to take his part in a place where he has wasted shall be assigned for his part, as it was before he committed the waste.

The equity of this statute, says Blackstone (d), extends to joint-tenants, but not to co-parceners; because by the law co-parceners might make partition, whenever either of them thought proper, and thereby the statute gave them this remedy, compelling the defendant either to make partition, and take the place wasted to his own share, or to give security not to commit any farther waste (e). But these tenants in common

any decided opinion on the second and third counts, on which the counsel did not much dilate, but which had no reference to the repairs done by J. Middleton.

(a) Bla. Com. book ii. ch. xxx.

(b) Ante, page 209.

(c) 13 Edw. 1. c. 22.

(d) Bla. Com. book iii. ch. xiv.

(e) Co. 2d Inst. pages 403, 404.

and joint-tenants are not liable to the penalties of the statute of Gloucester, which extends only to such as have life estates, and commit waste to the prejudice of the inheritance. The waste, however, he adds, must be something considerable; for if it amount only to twelve pence or some such petty sum, the plaintiff shall not recover in an action of waste: *nam de minimis non curat lex* (a).

This action of waste, says *Blackstone* (b), is a mixed action; partly real, so far as it recovers lands, and partly personal, so far as it recovers damages. For it is brought for both these purposes; and if the waste be proved, the plaintiff shall recover the thing or place wasted, and also treble damages by the statute of Gloucester. The writ of waste calls upon the tenant to appear and shew cause why he hath committed waste and destruction in the place named, *ad exhæredationem*, to the disinherison, of the plaintiff (c). And if the defendant makes default, or does not appear at the day assigned him, then the sheriff is to take with him a jury of twelve men, and go in person to the place alleged to be wasted, and there inquire of the waste done and the damages, and make a return or report of the same to the Court, upon which report the judgment is founded (d). For the law, says *Blackstone* (e), will not suffer so heavy a judgment as the forfeiture and treble damages, to be passed upon a mere default, without full assurance that the fact is as it is stated in the writ.

The nature of an action for waste.

But if the defendant appears to the writ, and afterwards suffers judgment to go against him by default, or upon a *nil dicit* (that is, makes no answer, puts in no plea, in defence), this amounts to a confession of waste, since, having once appeared, he cannot now pretend ignorance of the charge. Now therefore, the sheriff shall not go to the place to inquire of the fact, whether any waste has or has not been committed;

(a) Finch's Law, p. 29.

(b) Bla. Com. book iii. ch. xiv.

(c) Fitz. Nat. Brev. fo. 55.

(d) Popham's Rep. p. 24.

(e) Bla. Com. book iii. ch. xiv.

for this is already ascertained by the silent confession of the defendant; but he shall only, as in defaults upon other actions, make inquiry of the *quantum* of damages (*a*). The defendant, on the trial, may give in evidence any thing that proves there was no waste committed, as that the destruction happened by lightning, tempest, the king's enemies, or other inevitable accident (*b*). But it is no defence to say, that a stranger did the waste, for against him the plaintiff hath no remedy; though the defendant is entitled to sue such stranger in an action of trespass, and shall recover the damages he has suffered in consequence of such unlawful act (*c*).

When the waste and damages are thus ascertained, either by confession, verdict, or inquiry of the sheriff, judgment is given, in pursuance of the statute of Gloucester, c. 5, that the plaintiff shall recover the place wasted; for which he has immediately a writ of *seisin*, provided the particular estate be still subsisting (for, if it be expired, there can be no forfeiture of the land) and also that the plaintiff shall recover treble the damages assessed by the jury; which he must obtain in the same manner as all other damages, in actions personal and mixed, are obtained, whether the particular estate be expired or still in being (*d*).

Case of a tenant for life without impeachment of waste.

In the case of *The Earl of Cardigan v. Montague* (*e*), 6th June, 1755, a decretal order on the Master's Report; the Duke of Montague, tenant for life without impeachment of waste, had power to lease, reserving ancient rent where usually demised and made twenty-four leases. The Master's Report, as to many of the leases, which he reported bad, was submitted to. Such as where ancient covenants "to grind at mills, or to pay land-tax," were not in the new lease;—where some part, not within the power, was included in the lease; where many manors were included in the lease, reserving a sum certain as

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(a) Cro. Rep. temp. Eliz. 18. fo. 290. 2d Inst. 145. 50 Hen. 4. 2 b.

(b) Co. 1st Inst. fo. 35 a.

(d) Black. Com. book iii. ch. xiv,

(e) Bull. N. P. 120. Co. Litt. 283.

(c) Burr. Rep. vol. i. p. 122.

the best rent, which laid the remainder-man under difficulties, to find out whether it was the best rent or not.

As to five of them, which the Master reported to be good, exceptions were taken. Their validity turned upon this case. The words in the power were, "reserving ancient, usual and accustomed rents, heriots, *boons* and services." In the former leases, the tenants covenanted "to keep in repair," which covenant was omitted in this. The Lord Chancellor was of opinion that the said covenant was a *boon*, and *beneficial to the remainder-man*; and held these leases *void for want of it*. He took some days to consider, and declared he was clear upon the argument, but took time, because there was no case in point. The more he thought of it, the more, he said, he was convinced. The principle he rested upon was, that the estate must come to the remainder-man, in as *beneficial* a manner as ancient owners held it.

Redress for waste, may also be obtained in another way, which is *preventive*, whilst the former by writ of waste is *corrective*, and it must be allowed that it is better to *prevent*, than to *cure*. This is by a process called by lawyers a writ of *estrepement*. Another remedy or preventive for waste,

ESTREPEMENT, says Sir *William Blackstone* (a), is an old French word, signifying the same as waste or extirpation: and the writ of *estrepement* lay at the common law, says Lord *Coke* (b); after judgment obtained in an action real, and before possession was delivered by the sheriff, to stop any waste which the vanquished party might be tempted to commit on lands, which were determined to be no longer his. But as in some cases the demandant may be justly apprehensive that the tenant may make waste or *estrepement* pending the suit, well knowing the weakness of his title, therefore the statute of Gloucester (c) gave another writ of *estrepement*, *pendente placito*, commanding the sheriff firmly to inhibit the tenant By writ of estrepement.

(a) Bla. Com. book iii. ch. xiv.

(c) 6 Edw. 1. c. 13.

(b) Co. 2d Inst. p. 323.

to prevent waste and consequently *pendente placito dicto* *replevit*. And by virtue of either of these writs the sheriff may arrest them that commit, or offer to commit waste; and, if otherwise he cannot recover them, he may lawfully imprison the wasteors, or make a warrant to others to imprison them: or, if necessary require he may take the *peace* *commissarius* to his assistance. He is chosen in the sight of the law, says *Blackstone*, according to *Littleton* c. 21. *de waste and destruction*.

Method of  
obtaining these  
writs of pre-  
vention or com-  
pulsion of  
waste.

IN BRINGING FOR THESE TWO WRITS, *Blackstone* (b), has this difference very correctly observed: that in actions merely *possessory*, where no damages are recovered, a writ of *estrepement* might be had at any time *pendente lite*, may even at the time of suing out the original writ or this process. But in an action where damages were recovered, the demandant could not have a writ of *estrepement*, if he was apprehensive of waste after verdict and *scilicet* for writ regard to waste done before the verdict was given. It was presumed the jury would consider that in assessing the quantum of damages.

BUT NOW, touching the same matter (a), it seems to be held, by an equivoical construction of the statute of Gloucester, and in advancement of the remedy, that a writ of *estrepement* to prevent waste, may be had in every stage, as well of such actions wherein damages are recovered, as of those wherein only possession is had of the lands: for permissuere, saith the law, the tenant may not be of ability to satisfy the demandant in full damages &c. And therefore, now, in an action of waste itself, to recover the piece wasted and also damages, a writ of *estrepement* will lie, as well before as after judgment. For the plaintiff cannot recover damages for more waste than is contained in his original complaint: neither is he at liberty to assign or give in evidence any waste made after the suing out of

(a) *Blk. Com.* book iii. ch. xiv.

(c) *14 Inst.* fo. 322.

(b) *Book iii.* ch. xiv.

(c) *Fitz. Nat. Brev.* pp. 60, 61.

(d) *Blk. Com.* book iii. ch. xiv.

(e) *Fitz. Nat. Brev.* p. 61.

the writ. It is therefore reasonable, he says (a), that he should have this writ of *preventive* justice, since he is in his present suit debarred of any farther remedy (b).

If a writ of *estrepement*, continues *Blackstone* (c), *forbidding* waste, be directed and delivered to the tenant himself, as it may be, and he afterwards proceeds to commit waste, an action may be carried on upon the foundation of this writ; wherein the only plea of the tenant can be, *non fecit vastum contra prohibitionem*, he has not committed waste in the face of a prohibition: and if upon verdict it be found that he did, the plaintiff may recover costs and damages (d); or the party may proceed to punish the defendant for the contempt: for if, after the writ directed and delivered to the tenant or his servants, they proceed to commit waste, the Court will imprison them for this contempt of the writ. But not so, if it be directed to the sheriff, for then it is incumbent on him to prevent the *estrepement* absolutely, even by raising the *posse comitatus*, if it can be done no other way.

Process to forbid waste.

Besides this preventive redress at common law, *Blackstone* points out another remedy (e), mentioned in other parts of this Treatise (f); the Courts of Equity, upon bill exhibited therein, complaining of waste and destruction, will grant an injunction or order to stay waste, until the defendant shall have put in his answer, and the Court shall thereupon make further order; which is now become, he says, the most usual way of preventing waste.

The most usual way of preventing waste.

By the case of *Ferguson v. ———* (g), it appears that a tenant from year to year must not commit waste upon the estate he is occupying. The case in question was an action to recover damages for suffering a house of the plaintiff to be out

Tenant from year to year must not commit waste.

(a) Bla. Com. same chapter.

(b) Co. Rep. part v. p. 115.

(c) Bla. Com. book iii. ch. xv.

(d) Moore's Rep. p. 100.—Hobart's Rep. p. 35.

(e) Bla. Com. book iii. ch. xiv.

(f) Ante, pp. 43. 158. 161. 162. 194.

(g) Esp. Rep. vol. ii. p. 590, also ante, page 105, under the head of Distinction between tenantable and substantial Repairs.

of repair. The defendant had rented a house of the plaintiff as tenant at will, at a rent of 81*l.* a-year. On quitting it, the house was found to be so much out of repair, that the plaintiff had it surveyed and an estimate made of the sum necessary to put it *complete* instead of *tenantable* repair; and for the amount of such *complete* repairs he brought his action.

Lord Kenyon's rule as to such.

Lord Kenyon said that the plaintiff was not to be permitted to go for the damages so claimed; for a tenant from year to year is bound to *commit no waste*, and to make fair and tenantable repairs, such as putting in windows or doors that have been broken by him, so as to *prevent waste* and decay of the premises. But in the present case the plaintiff had claimed a sum for putting a *new* roof on an *old* worn-out house, which his Lordship thought a tenant from year to year not bound to do.

Case of tenant for life and of inheritance as to waste.

If lands or tenements be given or demised to two persons—to one for his *life*, and to the other with remainder to his heirs, and the tenant for life commit waste upon the property, he that hath the inheritance, according to the statute of Gloucester (*a*), can have no action of waste, but by the statute of Westminster (*b*) he can maintain such action.

Prevention of threatened waste.

Threatening to commit waste, by a *tenant for life*, is a sufficient ground for an injunction from the Court of Chancery, as shewn in the case of *Packington v. Packington* (*c*). And where defendant denies that he has committed any waste since the filing of the bill, it is no reason for refusing the injunction prayed for. See the cases of *The Attorney General v. Barwas* (*d*), and that of *The Countess of Strathmore v. Bowes* (*e*).

It is not necessary to stay till waste be committed.

It is not necessary to stay till waste is actually committed, where the intention appears, and the person insists on his right to do it. This important point in the law of waste was deter-

(a) 6 Edw. 1. c. 5. Ante, p. 206.

(b) 13 Edw. 1. st. 1. c. 22; see ante, pages 16, 198 and 262.

(c) Ante, page 164.

(d) Dick. Ch. Rep. vol. 1. p. 122.

(e) Ib. vol. iii. p. 647.

mined by Lord *Hardwicke* in the case of *Gibson v. Smith* (a), who decided at the same time, that if a person only threatens to commit waste, a plaintiff may certainly come into the Court of Chancery to restrain a defendant from doing it. Remedy.

His Lordship said, the plaintiff may certainly come into this Court to restrain the defendant from committing waste, even if he has only threatened to do it; nor is it necessary that the plaintiff should have waited till the waste be actually committed, where the intention appears, and the defendant, even by his answer, insists on his right to do it; there are a great many cases where such bills have been allowed, and indeed, if the defendant by his answer had disclaimed any right, there would have been no grounds for such suit.

If a bill is brought, he continued, by an owner of a reversion against a tenant for life, and no proof appears of any waste, yet if tenant for life insists on a right to do it, and it is proved that he has none, the Court of Chancery will nevertheless grant an injunction.

By the statute of Marlbridge (b), and of Gloucester (c), and its explanation (d), all tenants for life are punishable or liable to be impeached for waste, both voluntary and permissive, unless the leases, as I have before mentioned, are made without impeachment of waste, *absque impetitione vasti*, that is, with a covenant that no man shall impeach them for waste.

If a tenant for life commit waste to an inheritance, and threaten to commit further waste, an injunction may be granted by the Court of Chancery to the person in reversion, to restrain the tenant from *permitting* or *suffering* such waste:—as is well shewn in the following abridgment of the case of *Caldwell v. Bayliss* (e).

(a) Atk. Ch. Rep. vol. ii. p. 182.

(d) 9 Edw. 2. c. 3.

(b) 52 Hen. 3. c. 23.

(e) Meriv. Ch. Rep. vol. ii. p. 408.

(c) 6 Edw. 1. c. 5.



Case of an injunction to prevent waste.

This case was argued before the late Lord Chancellor, *Eldon*, on the 8th March, 1817, when an injunction was granted "to restrain the defendant, his agents, servants and workmen, from cutting down or felling timber or timber-like trees, except for repairs of buildings on the premises, and from *committing* or *permitting* or *suffering* any further or other waste, until answer or further order."

The case appears from Mr. *Merivale's Reports* to be, that the defendant's late wife, *Mary Bayliss*, devised the fee-simple of the premises, which were copyhold, to her husband the defendant for his life, "he keeping the interest of a certain mortgage charged on the premises paid, and *keeping the buildings in tenantable repair*, and not felling any timber except for such repairs. After his decease, she gave the same premises to her nephew, *Richard Ballard*, his heirs &c. (in case he should then be living) but if he should die in the life-time of the defendant, and then to the plaintiffs as tenants in common.

The defendant entered into possession on the death of his wife in 1796, but instead of keeping the premises in repair, he *permitted* them to go into decay during the life of *Ballard*, who had intended to commence proceedings against him, both at law and in equity, in consequence of his neglect, but desisted upon his promise to repair forthwith. In 1808 *Ballard* died, and the defendant having neglected to perform his promises, the buildings upon the premises, consisting of a farm-house and cottages, three barns, a stable and other edifices, grew ruinous for want of the needful repairs, which by an estimate made by an experienced surveyor for the plaintiffs in 1816, amounted to 157*l.* and upwards.

Plaintiff's affidavit.

The plaintiffs stated in their affidavits, that the defendant had, both before and since the death of *Ballard*, by himself, his servants, agents, and workmen, cut down timber to a great amount in value, and carried the same off from the premises, or converted to implements of husbandry and other articles, for the use of himself and his tenants, employing a very inconsiderable part on or towards the needful repairs, thereby

*committing or suffering great waste and great damage to the inheritance, and also that he threatened to commit or suffer further or other waste.*

This affidavit by the plaintiffs, was accompanied by another, The surveyor's affidavit.  
by the surveyor, whom they had employed to make the estimate and to report as to the ruinous state of the buildings, and also as to his having been prevented by the tenant residing on the estate from surveying the whole of such buildings.

Messrs. *Hart* and *Heys* appeared as counsel for the plaintiffs in support of the motion for an injunction; the defendant had appeared, but had not put in his answer.

*The injunction was granted.*

A parson, vicar, archdeacon, prebend, chantry priest, and the like, may have an action of waste, and in the writ it shall be said, *ad exharedationem ecclesiæ &c. ipsius B., or præbendæ ipsius A. (a).*

If the husband and wife commit waste, says Lord *Coke* (*b*), the first lessor shall have a writ (*c*) of waste against them, for that inasmuch as the wife is in her remitter, he is remitted to his reversion. But it seemeth in this case, if he that recovereth by the false action, will bring another writ of waste against the husband and his wife, the husband hath no other remedy against him, but to make default to the grand distress &c., and cause the wife to be received, and to plead this matter against the second lessor, and shew how the action whereby he recovered was false and feigned in law &c. So the wife may bar him.

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(a) Fitz. Nat. Brev. 55 D & 57 E, F. the preface to his *Natura Brevium*, 10 H. 7. 5. "are next in authority to the written

(b) Co. 1st Inst. Thomas's edition, law itself, and are the very basis and foundation of the common law, upon

(c) "Writs," says Fitzherbert, in which the whole law doth depend."

Trustees are bound to protect the inheritance from waste.

It is further to be observed, says Mr. *Thomas* (a), that trustees to preserve contingent remainders are also bound to protect the inheritance from waste, and to keep it as entire as possible; and as the inheritance consists of land, timber, mines &c. all these are under their protection; and, in the execution of this trust, they are entitled to every assistance which a Court of Equity can afford them. And, where there is a limitation to trustees to preserve contingent remainders, the Court of Chancery will not permit a tenant for years to join with the person entitled to the inheritance for the time being, to cut down timber on the estate (b). And it is held, that trustees to preserve contingent remainders are guilty of a neglect of their duty, if they permit the tenant for life, liable to impeachment for waste, or a tenant *pur autre vie*, who by the nature of his estate is liable for waste, to destroy timber (c).

*A.* lessee for twenty years makes lease to *B.* for ten; *B.* continues in possession after the expiration of the lease for ten years, and commits waste. *A.* may have either trespass or action on the case, because he is chargeable over in waste (d).

And he will be restrained in equity from committing waste (e). And the Court will also decree an account to be taken of trees cut down, and direct the produce to be applied, first, in payment of the interest, and then in sinking the principal of the debt (f). However, it has been held, that a mortgagee of a copyhold may pull down ruinous houses, and build better ones, to prevent a forfeiture (g).

Tenants for short terms, as for half a year, liable to waste.

The Statute of Gloucester, cap. 5, says Mr. *Thomas* (h), which giveth the action of waste against the lessee for life or

(a) *Thomas's Coke's 1st Inst.* vol. ii. p. 139.

(b) *Garth v. Cotton*, *Dick.* vol. i. p. 183. *Cru. Dig.* vol. ii. p. 402.

(c) *Stappfield v. Habbergham*, *Ves. Rep.* vol. x. p. 283.

(d) *Easter Term*, 6 Car. B. R. *Creek*, n. 7, *West and Treude*, Hal.

MSS. See *Cro. Ch.* 187, and *S. C.* *W. Jo.* 224. (*Hargr. n. 4. 37 a. (380.)*)

(e) *Vern.* vol. ii. p. 392.

(f) *Atk.* vol. iii. p. 723.

(g) *Hardy v. Reeves*, *Ves. Rep.* vol. iv. 480.

(h) *Thomas's Coke 1st Inst.* vol. i. p. 29.

years (which lay not against them at the common law), speaketh of one that holdeth for term of years in the plural number; and yet it appeareth by the authority of *Littleton* (a), that although it be a penal law whereby treble damages and the place wasted shall be recovered, yet a tenant for half a year, being within the same mischief, shall be within the same remedy; though it be out of the letter of the law; for *qui hæret in litæd, hæret in cortice*, which is an excellent example, whereupon in many like cases a man may settle a certain judgment.

If I grant the reversion of my tenant for life, says Lord *Coke* (b), to another for life, now shall I not have an action of waste; but if I release to the grantee for life, and his heirs, now he hath the fee-simple, and shall punish the waste done after. In the case here proposed, says his Commentator (c), the lessor cannot have an action of waste, because he has granted away the reversion, in respect whereof such action is maintainable; but the releasee may maintain such action because he has the immediate reversion in fee.

And the reason wherefore the lease for years in the case aforesaid shall be avoided, is, because of necessity the action of waste must be brought against the lessee for life, which in that case must bind the lessee for years, or else by the act of the lessee for life the lessor should be barred to recover *locum vastatum*, which the statute giveth (d). "For the recovery relates to the time of the waste done, which is paramount to the grant, but it does not relate to the time of making the estate, to avoid charges by force of this condition in law, unless in the case of a lease for years, which is of necessity to have the place wasted."

Concerning nuisance, Lord *Coke* (e) says, "The earth hath in law a great extent upwards, not only of water, as hath been

(a) Sect. 67.

(b) Co. 1st Inst. fo. 54 a.

(c) Thomas's Coke, 1st Inst. vol. ii. p. 501.

(d) Lord Nott. MSS. Thomas's Co.

vol. ii. p. 116.

(e) Thomas's Coke, vol. i. p. 192.

Nuisance to  
buildings.

said, but of air and all other things even up to Heaven; for *cujus est solum ejus est usque ad cælum*, as is holden 14 H. 8. fo. 12. 22 H. 6. 59. 10 E. 4. 14." *Registrum origin* and in other books; and therefore, says Mr. Thomas in a note on this passage, no man may erect any building or the like, to overhang another's land; and downwards whatever is in a direct line between the surface of any land and the centre of the earth, such as mines of metals and other profits, belongs to the owner of the surface. So that the word "land," includes not only the face of the earth, but every thing under it, or over it. And therefore if a man grants all his lands, he grants thereby all his mines of metal, and other fossils, his woods, his waters, and his houses, as well as his fields and meadows (a).

The common law, says Lord Coke (b), prohibiteth the building of any edifice to a common nuisance, or to the nuisance of any man in his house, as the stopping up of his light, or to any other prejudice, or annoyance of him. *Ædificare in tuo proprio solo non licet, quod alteri noceat*.

Leases, cove-  
nants &c.

Before closing this Treatise, a short space may be well spared, to the subject of leases and covenants.

The word *lease*, says Lord Coke (c), is derived from the Saxon *leasum* or *leapum*, because the lessee cometh in by lawful means. It is also called a *demise*, from *demettere*, a French *laisser*, to depart with or forego, and from which Dr. Johnson derives the word *lease* (d).

Custom of  
leaseholding  
as to repairs,  
waste &c.

By the custom of leaseholding, and by the laws which regulate landlord and tenant, the owner of any property which is leased to another, has a right to have it restored to him, at the expiration of the term for which it is leased, in a state according to the spirit of the meaning in which it was so leased to him; and in whatever state it is worse than that, is dis-  
missed.

(a) Bla. Com. book ii. p. 18.

(b) Inst. part iii. p. 201.

(c) Co. 1st. Inst. p. 43 b.

(d) For a further account of this

word, see "Architectural Jurisprudence," by the Author of this Treatise, part ii. tit. *Lease*.

dation, waste or damage, which must be made good by re-instatement, or a sum of money equivalent thereto.

Repairs, waste and dilapidations to leasehold houses are generally governed by the covenants.

Covenants of leases as to repairs, waste &c.

Covenants, say the Roman lawyers (*a*), are engagements made by the mutual consent of two persons, who agree or make a law among themselves to perform what they promise to one another. Therefore it was with reason that Lord Kenyon said (*b*), *modus et conventio vincunt legem*, for they are laws made by themselves and which must bind them. Covenant is also a general name (*c*), which comprehends all manner of contracts, treaties, and pacts of what kind soever.

There are two sorts of covenants in leases, which is necessary to be understood by the architectural surveyor, namely, *express* and *implied*, and they subsist either in law or in fact.

Two sorts of covenants in leases.

On the difference between *express* and *implied* covenants, as mentioned before in page 103 of this Treatise, it has been decided in *Nokes's case* (*d*), that the words "demise" or "grant" in a lease for years, contains an *implied* covenant. But a distinction, says Mr. Thomas, in animadverting on this page (*e*) is observable between the operation of an *express* covenant in restraining the effect of an *implied* general covenant, and the operation of a *particular* covenant in restraining the effect of an *express* general covenant; for the latter is not restrained by a subsequent covenant, unless it can be considered as part of the general covenant (*f*).

On express or implied covenants.

(a) "Et pactis duorum, pluriumve in idem placitum consensua." Just. Dig. lib. ii. leg. 1. § 2.

(b) Ante, page 249, note (a).

(c) "Conventionis verbum generale est, quod continet, de quibus hec est contrahendi, transigendique cau-

sa, consentiant qui inter se agunt."

Just. Dig. lib. ii. leg. 1. § 3.

(d) Co. Rep. part iv. fo. 90 b.

(e) Thomas's Coke, 1st Inst. vol. ii. p. 253, n.

(f) See also Saund. Rep. vol. i. p. 60.

Implied covenants.

*Implied* covenants are inherent (*a*), and are in all cases controuled within the limits of an express covenant; and caution ought therefore to be used in introducing into a lease too many express covenants; as in certain cases, the evil intended to be guarded against, may frequently be prevented or recompensed in a greater degree by an *implied* than by an *express* covenant. The distinction between *implied* covenants by operation of law, and *express* covenants, is, that *express* covenants are to be taken more strictly (*b*).

Illustrative case.

In the case of *Jones, d. Cowper v. Verney* (*c*) it was decided by the Court of Common Pleas, that an *express* covenant to repair and uphold, does not *imply* a covenant to pull down and rebuild, otherwise a building lease; for there is nothing in such *express* covenants that would authorize a lessee to pull down the building, nay, it would be waste, according to Lord Coke (*d*) if he did.

Conversion of leasehold property without leave is waste.

Breach of covenant.

An action of ejectment will lie for breach of covenant as ruled by Lord *Ellenborough* in the case of *Doe*, on the demise of *Vickery v. Jackson*, in the Sittings after Michaelmas Term, 1817, that the breaking a door-way through the wall of a demised house into an adjoining house, and keeping it open for a long space of time, amounts to a breach of covenant to repair. It was an action of ejectment, brought against the assignee of the lessee of a house, on a forfeiture for breach of covenant.

The lease contained a *particular* covenant, to repair within three months after notice, and also a *general* covenant to keep in repair. The evidence of dilapidation principally relied upon, was, that the defendant had broken a door-way through the wall of the demised house into the adjoining house.

Mr. *Gurney*, for the defendant contended, that the breach of covenant had been waived by the subsequent acceptance of rent after notice given, and said, that it had always been the

(a) Sheph. Touchst. p. 161.

(b) Barrows's Rep. vol. iii. p. 1639.

(c) Wils. Rep. p. 175.

(d) Co. 4th Inst. fo. 63.

intention of the party to rebuild the wall before the end of his term; but

Lord ELLENBOROUGH held, that this was a continuing breach and a want of repair, which amounted to a forfeiture.

Messrs. *Scarlett, Marryatt and Chitty*, for the plaintiff, and Messrs. *Gurney and Deacon* for the defendant.

A landlord having given notice to his lessee (under a covenant in the lease) that he would re-enter if the premises were not put into repair within three months, if an auctioneer sell the lease without communicating the notice to the vendee, the latter may recover his deposit from the auctioneer although he knew the dilapidated state of the premises at the time of the sale.

Other illustrative cases.

This was shewn in the case of *Stevens v. Adamson*, which was an action of assumpsit, brought against the defendant, an auctioneer, to recover the amount of a deposit paid on the purchase of certain leasehold premises which the defendant had sold by auction, and of which the plaintiff had become the purchaser.

Plaintiff's case.

The premises, which consisted partly of a public-house, and other buildings, were, at the time of the sale, in a very dilapidated state, and by the terms of the original lease, the lessor was entitled to re-enter, in case the premises were not put into repair, within the space of three months next after notice given to the lessee to that effect, notice to repair had been served upon the lessee (the vendor), on the day before the sale, but this circumstance had not been communicated to the present plaintiff, and he had afterwards been ejected from the premises, in consequence of the breach of covenant.

On the part of the defendant, it was answered, that the defendant himself was not aware of the notice when the premises were put up to sale; and that the plaintiff himself was well aware at the time of the ruinous state of the premises.

Defendant's answer.



Chief Justice ABBOTT was of opinion, that a person putting up premises for sale was bound to know how the premises were circumstanced; and whether notice of re-entry had been given by the landlord, in case the premises should not be put in repair. In such transactions, good faith was most essential, and the vendor, or his agent, was bound to communicate to the vendee the fact of such notice.

Verdict for the plaintiff.

Mr. Barrow, for the plaintiff; Mr. Marryatt, for the defendant.

If lessor had covenanted by deed to repair, to debt for the rent by lessor; lessee may plead, "that he had *expended the rent in necessary repairs*;" which it seems by law he can do, as shewn in the case of *Taylor v. Beale* (a), (though this was doubted by *Holt* (b).) But defendant must plead this special matter, and cannot give it in evidence in the general issue, for he might have covenant on it against the lessor: but under the general issue defendant may give it in evidence, *that he paid the rent to persons who had rent-charges out of the land*, by command of lessor; for payment by plaintiff's appointment is payment to himself.

*Johnson*  
v.  
*Carre*,  
1 Lev. 152.

But where there is an *express* covenant that lessee may deduct for charges and repair, in the same indenture; there clearly the defendant may plead it in bar of debt for the rent.

Case of covenant to repair, where the house was burned, and afterward rebuilt.

If, in the case of an action on the covenant for not repairing a house, the defendant should plead that the house was burned; but was rebuilt and repaired, before the action was brought, the plea, says Sir *Edmund Saunders* (c), is bad, unless it shews *by whom* it was rebuilt and repaired.

Plaintiff's case.

This plea is illustrated in the case of *Walton v. Waterhouse* (d), wherein the plaintiff stated in his declaration that

(a) Cro. Rep. temp. Elis. p. 323.

(b) Lord Raym. vol. i. p. 420.

(c) See his Reports, vol. iii. p. 420;

also Keb. vol. iii. p. 40.

(d) *Ibid.*

*Thomas Walton*, his father was seised of a dwelling-house, with the appurtenances, in the parish of *St. Bride*, otherwise *Bridget*, London, in a common alley, leading from *Fetter Lane* to *Shoe Lane*, in his demesne as of fee; and being so seised, by indenture (brought into Court) demised to the defendant the said dwelling-house with the appurtenances, *habendum* for the term of twenty-one years. And the defendant covenanted by the said indenture that he would sufficiently repair, support, uphold, maintain, amend and keep the said dwelling-house with the appurtenances in good and sufficient repair as often as occasion should require; and that by force of the said demise the defendant entered, and was thereof possessed; and he being so possessed, and the plaintiff's father being seised of the reversion thereof in his demesne as of fee, the father died, and the reversion descended to the plaintiff as son and heir of his father, who was seised of the said reversion in his demesne as of fee, and he being so seised, and the defendant being so possessed of the said messuage for the term aforesaid, " afterwards, to wit, on the 29th day of September in the twentieth year of the reign of the now King (24 Car. 2. Regis), the said dwelling-house with the appurtenances was wholly fallen down and ruinous, and that the said *Jasper Waterhouse* (the defendant) did not sufficiently repair, support, uphold or maintain the said dwelling-house with the appurtenances with necessary reparations and amendments, but permitted the said dwelling-house with the appurtenances, on the day and year last aforesaid, and continually hitherto, to be and remain wholly ruinous and fallen down, against the form and effect of the covenant of the said defendant in that behalf, to the plaintiff's damage &c. wherefore he brought this action."

Defendant suffered his tenement to be ruinous contrary to the covenants of his lease.

The defendant pleaded in bar of the action, that " after the demise of the said dwelling-house with the appurtenances in form aforesaid by the *Thomas Walton*, the father to the said *Jasper*, and before the said dwelling-house was fallen down and ruinous, to wit, on the 27th day of March, in the 17th year of the reign of our said Lord the now King, at London aforesaid, in the parish and ward aforesaid, the said *Jasper* granted and assigned to one *George Johnson*, gent. his exe-

Defendant's plea.

The premises  
were destroy-  
ed by the  
great fire of  
London,

and rebuilt.

The plaintiff  
demurred that  
it was not  
stated by  
whom it was  
so rebuilt.

Sir Edmund  
Saunders's  
argument  
thereon.

cutors, administrators and assigns, the aforesaid dwelling-house with the appurtenances, and all the estate, right, title and term of years of him the said *Jasper Waterhouse* of and in the same, then to come and unexpired; by virtue of which said grant and assignment he the said *George Johnson* entered into the said dwelling-house with the appurtenances, and was possessed thereof; and being so possessed thereof, the said *Jasper* further saith, that the said dwelling-house with the appurtenances, was afterwards burnt, destroyed and wholly demolished by a great fire, which burnt and consumed the greatest part of the city of *London*; and that in a convenient time after the destruction of the said dwelling-house, and before the exhibiting of the bill of the said *Thomas Walton* (the now plaintiff), to wit, on the 1st day of April, in the twenty-first year of the reign of our said Lord our now King, the said dwelling-house, with the appurtenances, was well and sufficiently rebuilt, repaired, supported, upheld and maintained with needful and necessary repairs and amendments, and yet is in good and sufficient repair, according to the form and effect of the said indenture. And this &c. wherefore &c. upon which the plaintiff demurred specially, and shewed for cause that the defendant does not say by whom the said dwelling-house was rebuilt.

Whereupon Sir *Edmund Saunders*, who appeared for the defendant, argued, *first*, that there was no necessity for the defendant to shew by whom the dwelling-house was rebuilt: *First*, because it does not lie in the knowledge of the defendant, who had rebuilt it, he having a long time before the destruction of the dwelling-house assigned all his interest over to *Johnson*, as appears by the plea. *Secondly*, it was not material to the plaintiff who had repaired and rebuilt the dwelling-house; for who ever has repaired it plaintiff derives the same benefit from it, as if the defendant himself had repaired and rebuilt it. *Thirdly*, if any stranger had entered and rebuilt the dwelling-house, the defendant could not therefore rebuild it, it being already done to his hand, and yet the plaintiff has not had any loss by it; and therefore it was unreasonable that the plaintiff should recover any damages against the defendant,

who had not done any wrong, nor could prevent another from rebuilding the dwelling-house, because he had assigned over all his interest before; and so could not enter and rebuild it himself. *Fourthly*, as to the objection, that perhaps the plaintiff himself had repaired and rebuilt the said dwelling-house, (and so was the truth of the case), he said that should not be intended; for although it is not said in the plea, that the defendant repaired the dwelling-house, yet it would be too foreign an intendment that the plaintiff himself had repaired it; for if it had been so done, it would have been of his own wrong, for during the term the plaintiff himself ought not to have intermeddled with the possession, and therefore, as the case appeared on the record, that could not be well intended; but if the truth had been so, the plaintiff ought to have replied it, and not to have demurred upon the plea.

. But Sir *Matthew Hale*, the Chief Justice, would not hear these reasons; but the other side alleging that the plaintiff himself had repaired the dwelling-house, and could have no proportion of the expenses of it, he said that the plaintiff having shewed the aforesaid cause of his demurrer specially, and the defendant refusing to amend his plea, as he ought before the demurrer was joined, but had pleaded so on purpose to trick the plaintiff, he gave judgment for the plaintiff immediately (*"quasi,"* says Sir *Edmund Saunders*, who reported the case, *"in a passion"*) and a writ of inquiry was awarded; *"but,"* says Sir *Edmund*, *"in my opinion without any consideration of the matter in law (a), whether the plea was sufficient or not."*

*Sir Matthew Hale's judgment.*

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(a) See, however, Vent. vol. i. p. 38. Anon. where Twysden, Justice, held that the defendant ought to shew by whom the house was repaired, for otherwise it might be intended that the plaintiff himself had repaired it; and although Kelynge, Ch. J. and Rainsford, Justice, were of a contrary opinion, yet the case was adjourned.

In this case the covenant was to repair generally; and no defence is at-

tempted to be made, upon the ground that the house was burnt by accident. Indeed, if such an attempt had been made, it would have been of no use, because the established principles of law upon the subject are clear, that the lessee would have been bound to rebuild the house, notwithstanding the accident; the distinction being between a duty created by law, and one created by the party. For when the law creates a duty, and the party is

disabled to perform it without any default in him, *and he has no remedy over*, the law will excuse him: as in waste, if a house be destroyed by tempest, or by enemies, the lessee is excused; so in escape, if a prison be destroyed by tempest or enemies, the gaoler is excused. 33 H. 6. 1.: but when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.—And therefore if a lessee covenant to repair a house, though it be burnt by lightning or thrown down by enemies, yet he is bound to repair it. Bro. tit. Covenant, 4. Alleyn, 27. Paradine v. Jane, Dy. 33 a, pl. 10. So where in covenant for not keeping a bridge in repair, the defendant pleaded that the bridge was, by the act of God, by a great and extraordinary flood of water such as the bridge could not resist, without the default of the defendant, washed, broken, and fell down; this plea was on demurrer adjudged to be insufficient. Term Rep. vol. vi. p. 750, The Company of Brecknock Navigation v. Pritchard. So where in covenant against tenant for life under a marriage settlement, who had covenanted to repair the house during his life and so leave the same at his death, the defendant pleaded that three-fourth parts of the house was burnt down, and that he repaired it until it was burnt, and had repaired the residue that was not burnt. On demurrer to this plea, the Court was of opinion that it contained no answer whatever to the declaration; for the defendant having covenanted to repair, without any exception, it imported, that he should at all events repair the house, and, in case it were burnt, or fell down, should rebuild it. Com. Rep. p. 627, Earl of Chesterfield v.

Duke of Bolton. And the same point precisely was determined in the case of Bullock v. Dommitt, Term Rep. vol. vi. p. 650, on the authority of the last-mentioned case. See vol. i. page 322 a. note (?).

It was this liability of the tenant to rebuild, notwithstanding the house should be burnt down by accident, or blown down by tempest, that, in all probability, occasioned an exception, now frequently introduced in leases, of casualties by fire, and sometimes by wind and tempest. But even then the lessee is bound to pay the rent during the term, although the house should be burnt or blown down, if there be an express covenant for payment of the rent, for the same reason, and upon the same principles that he is bound to rebuild, namely, because he has bound himself by an express covenant to pay the rent. And as it appears by the before-mentioned case of Paradine v. Jane, All. 26, that it is no plea in such case, to an action of covenant for non-payment of the rent, to say, that the house was destroyed by the king's enemies, or that the defendant was evicted and turned out of possession by them, so it is equally no answer to say that the house was burnt or blown down, and therefore he is not bound to pay the rent. Thus in covenant for non-payment of rent reserved by a lease in which the lessee covenanted to pay the rent, and also to repair, except the premises should be demolished or damaged by fire, the defendant pleaded, that before the rent became due, the premises were burnt down against his will, and that they were not rebuilt by the plaintiff during the whole time for which the rent was demanded, nor had he any enjoyment of the premises; but on demurrer, the plea was held ill, on the authority of the last-cited case in Alleyn, p. 27; for that whatever might

as the default of the plaintiff in not repairing, yet the defendant must, in all events, perform his covenant to pay the rent. *Ld. Raym.* vol. ii. p. 1477, *Monk v. Cooper*. *Stra.* vol. ii. p. 763. S. C. And expressly the same point was afterwards determined upon the authority of the last-cited case, in the *Term Rep.* vol. i. p. 310, *Belfour v. Weston*. S. C. cited *Ibid.* 710. And it seems the lessor is not bound to rebuild, though he may insist upon the payment of the rent during the whole term. *Pindar v. Ainsley*, cited in *Term Rep.* vol. i. p. 312. *Belfour v. Weston*, *Term Rep.* vol. vi. p. 488. *Weigall v. Waters*. However it is said, that if the landlord refuses to rebuild, and yet brings an action of covenant for the rent, a Court of Equity will grant an injunction to prevent his enforcing payment until he has rebuilt the premises. *Ambl.* p. 619, *Brown v. Quilter*; and *Steele v. Wright*, cited in *Term Rep.* vol. i. p. 708. *Dee v. Sandham*. But see *Anst.* vol. iii. 687, *Hare v. Grove*; and *Anst.* vol. ii. 575, *Waters v. Weigall*.

Before concluding this Work, it may be requisite to say a few words on the present Building Act, in which, owing to alteration of circumstances and other reasons well known to the members of my profession, many improvements have become necessary. A new Act has been long in contemplation, and I have been employed for a considerable time in preparing heads, for the purpose of being submitted to the proper authorities, several of whom have honored me by consulting me on the subject. A Bill has, in fact, within these few weeks, been brought into the House of Commons, and a Select Committee is to be appointed to investigate its merits. The leading improvements that appear necessary to accomplish this object are as follow:—

- To reconcile many of the contradictions (a) in the present Act, which have been much complained of by architects, builders, and gentlemen of the legal profession.
- To increase the security of buildings against fire, particularly in prohibiting breastsomers of timber.
- To sub-divide the larger districts.
- To extend the limits of the Act.
- To make a more concise and perspicuous arrangement of the laws on the subject.
- To amend the present mode of regulating the rates of building.

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(a) See page 222, for Chief Justice Eyre's opinion, amongst others, on this Act.

It would be very desirable also, to create a permanent and united body of district surveyors, as a sort of college, with a president and other officers, to decide disputed cases, and also to prevent the employment of inexperienced persons in a business of so great importance to the safety of the public.

I have lately met with a pamphlet, by a gentleman of my own profession, named *Ainger*, whose observations on the imperfections of the present Building Act so perfectly coincide with my own, that I shall take the liberty of repeating, with a view of enforcing, the sentiments of this gentleman on the subject about to be investigated.

He shews, that instead of seven rates of buildings, four would be sufficient, and that buildings described in the other three should have been considered as exemptions.

The impropriety of determining the rate of a building by its appropriation to a particular purpose, is very evident, from the fact, that new proprietors and occupiers may, and frequently do, change the purpose for which the building was originally erected.

The walls of buildings in which certain trades and manufactures are carried on, should be thicker than their rates at present classified, would seem to require; but the purpose of the building should not be solely the object of consideration, without reference to its height; this height should be measured from the surface of the pavement or street, above the usual area in front of the house, to the top of the coping.

By the practice of making rooms in the roof, party-walls are weakened for want of the connecting walls in front or back, and the beauty and uniformity of the streets disfigured; also, danger arises to passengers from the unsafe manner in which coping stones are frequently laid.

The rating buildings according to their value, causes the introduction of expensive cornices, plate glass, &c. and forms an

improper criterion, as does the portion of horizontal area—the height of the building being the only proper rule by which the thickness of walls, in regard to public security, should be determined; to prevent, however, the stories being built unhealthily low, their number might be made a measure of the rate, conjointly with the height.

The useless and absurd repetitions in many of the clauses of this act, embracing subjects of comparatively trifling importance, might beneficially be dispensed with; much inconsistent verbiage would be avoided by comprehending these minor matters respecting footing, recesses, &c. under one general clause.

Those parts of walls which are built of stone, should not be of diminished thickness, as a good brick wall would be less injured by fire than one of stone.

The utility of the regulation that party-walls shall be of the same thickness to the top, which is not the case with external walls, is not apparent; in truth the very reverse; for in case of an adjoining building being destroyed or falling into ruins, the stability of the party-wall would be injured by its being of equal thickness at the top as at the lower stories, and the necessity imposed on builders of making eighteen inch walls in the upper stories of first-rate houses, has led to evasions of false flues and hollow walls.

The regulations in sections 14 and 43 are inconsistent, and very embarrassing to builders and others who are desirous of honestly complying with the mandates of the law.

The inefficiency of the provisions of section 15, might enable builders to leave their external walls, in certain cases, so thin, as to be unsafe to the public, if their interest did not induce them to provide better for their own and the public safety than the Building Act has done.



There are eighteen sorts of buildings, which if situate out of the liberties of London and Westminster, are entitled to be constructed of any dimensions and with any materials, so that very commonly wooden buildings are erected contiguous to brick ones, in which dangerous trades are carried on, without the security of party-walls.

The distinctions made between the cases of insufficiency of walls of buildings which are to remain, in respect of their magnitude, and those intended to be rebuilt, in the one case requiring notice of three months, and the other not, if not arising from accidental mistakes in legislating, are certainly capricious and absurd.

The provision of section 25, which forbids the erection of a small building against the wall of a larger, although its external wall is sufficiently thick to serve for a party-wall, seems oppressive, since the erection of a superior against an inferior building, is allowable.

The permission given by section 26, to reduce the height of the party-wall above the gutter, to less than twelve inches, when the parapet is under that height, without defining how much less, was injudicious, being calculated to defeat the object of safety from those walls; and the provision for leaving openings is unnecessary and dangerous.

Section 28 cannot, in many instances, be complied with.

The expressions made use of in section 29, viz. side-front, back-front, &c. are absurd and ill chosen. Party arches over public passages should have been forbidden *in futuro*, instead of being provided for in section 31.

Section 33 does not state who is to reimburse the expense of repairing decayed and ruinous party-walls; to those persons who are compelled by the act to perform the work.

"*Making use of a party-wall,*" is an expression not sufficiently defining the persons who are to reimburse the builders, see section 41; a great portion of this section is unintelligible; that part, however, which fixes the price of brick-work in party-walls, Mr. *Diaper* very properly terms "the crying evil of the Building Act," and I agree with him in reprobating this most absurd regulation of a fixed price for materials and labour of an uncertain description as to nature and quality, and unalterable by change of times and circumstances, and the comparative value of money. This must produce evasion, which cannot justly be termed fraudulent, being rendered necessary by this very unfair legislative enactment.

The directions for chimneys in section 45, should have been included in section 39, which had previously treated of them.

The clause which treats of projections, has been the cause of much litigation, from a want of clearness and certainty in the expressions made use of; and the uncertainty has been further increased by the Paving Act, the provisions of which are far from being in accordance with the regulations of the Building Act; whereby a most distressing perplexity must be caused to all the expounders of law, and to numerous respectable individuals, subjected and desirous of conforming to its dictates, but distracted in their efforts by the anomalies, uncertainties, absurdities, and contradictions of these two conflicting statutes.

In section 55, the expression "distinct tenure," is uncertain as to meaning, and the violation, without scruple, of this clause, make its repeal or alteration desirable.

The absurdity of limiting the time within which an action for damages can be brought, to three months, is apparent, but not confined to the Building Act, for very useful regulations in other acts have been defeated by a similar limitation.

I shall now, in taking leave of my readers, repeat the words of the great legal sage whom I have so often quoted, Lord Coke, who says (a), "I shall heartily desire the wise hearted and expert builders (justice being *Architectonica virtus*) to amend both the method or uniformity, and the structure itself, wherein they shall find either want of windows or sufficient lights, or other deficiency in the architecture whatsoever. And we will conclude with the aphorism of that great lawyer *Edmund Plowden* (which we have heard him often say) *Blessed be the amending hand*"—

"DEO GLORIA ET GRATIA."

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(a) Epilogue to his 4th Institute.

END  
OF  
TREATISE.

## APPENDIX.

### No. I.

Action on the Case, for dilapidations by a parson against his predecessor (a).

JONES v. HILL.

**T**HIS was an action brought in the Court of Common Pleas, 1st Wm. & Mary, by a parson against his predecessor for dilapidation, declaring that the defendant being a parson, accepted another benefice and left the houses of his former benefice out of repair; and the custom of the realm was, that in such a case he ought to pay to the successor *tant' denar' sum' quant' sufficient ad reparand'*, and the repairs amounted to so much, which the defendant had not paid. After verdict for the plaintiff, it was moved in arrest of judgment, that the action did not lie, and Chief Justice *Pollexfen*, who tried the cause at Warwick Assizes, was of the same opinion at the trial, and continued still in the same mind, saying it was suable merely in the Ecclesiastical Court. But the counsel for the plaintiff, who were for maintaining the action, cited at the bar, *Degge's Parson's Ley*, part i. c. 8. p. 79, where it is asserted, that many such actions had been maintained. They also cited Hil. 18 Hen. 8. rot. 306. Hil. 15 Jac. 1. rot. 474. Mich. 12 Hen. 8. rot. 730. But on searching the rolls, it was found that no judgment had been given in any of those cases, though in some of them a verdict and divers continuances were entered. But Mich. 3 Jac. 2. C. B. rot. 332, between *Day* and *Hollington*, in the like case, judgment was for the plaintiff upon a demurrer. But now the court inclined to the opinion of the Chief Justice *Pollexfen*, yet ordered the cause to be put in the paper to be further argued; and afterwards in Trinity Term, Chief Justice *Pollexfen* and Mr. Justice *Ventris* being dead, the case was again argued before Justices *Powell* and *Rokesby*, and they gave judgment for the plaintiff. Sir *Creswell-Levinz*, from whose Reports this case is taken, being counsel for the plaintiff.

JONES  
v.  
HILL,  
Lev. part iii.  
p. 268.

(a) See the preceding Treatise, page 3.

## No. II.

The successor may have separate actions against the executor of the late rector, for dilapidations to different parts of the rectory (a).

## YOUNG v. MUNBY.

YOUNG  
v.  
MUNBY.

The plaintiff brought this action, as rector of the rectory of Gilling in the county of York, against the defendant as executor of *Piggott* the late rector, declaring that by the laws and customs of the land of this kingdom of England &c. *rectors are bound to repair the houses, buildings, tenements, chancels and pews belonging to their rectories, and to leave the same well and sufficiently repaired to their successors; and in default thereof then that the executor or administrator of such rector, after his decease, is bound to satisfy the successor such a sum as is sufficient for the reparation of such of the premises as are left unrepaired and dilapidated; and that Piggott was seised in right of his rectory of a certain pew in the church, and was bound to keep it as well as the chancel in repair, and that Piggott died seised of the rectory, and that the plaintiff succeeded; and that at the time of Piggott's death the chancel of the church and the pew were ruinous and in decay for want of repair, and that the expense of repairing the same would amount to 100*l.*, of which the defendant had notice, yet he refused to pay the said 100*l.* &c.*

It was pleaded in bar, that heretofore, before the commencement of this suit, to wit, in Trinity Term, 54 Geo. 3. the plaintiff impleaded the defendant as executor as aforesaid, in this court, in a plea of trespass on the case, setting forth a declaration in the same form as the above, namely, *for want of reparation of the rectory-house, out-houses and cottages belonging to the rectory, and of the gates and hedges upon the glebe lands &c.* And such proceedings were thereupon had, that afterwards in Michaelmas Term, the plaintiff recovered against the defendant as such executor the sum of 280*l.* 6*s.* for his damages &c. as by the record &c.; and the plea alleged that the same state of ruin and decay of the chancel and pew in the declaration in this action mentioned, existed before and at the time of the commencement of the former action, and that the damages now sought to be recovered might have been included in the former action, and recovered therein &c.

In reply, it was denied that the damages sought to be recovered in this action were in any manner included in the declaration mentioned in the plea, nor were the same or any part thereof recovered in the action mentioned in the plea.

Demurrer. Joinder.

(a) See the Treatise, page 3.



Mr. (now Sir *Nicholas*) *Tindal* argued in support of the demurrer, that a plaintiff is not at liberty to subdivide one entire cause of action, and to bring so many separate actions as there may be consequences resulting from it, but that he is bound to include all the consequences under one action, and to recover damages for them once for all. As if a man recover in assault and battery, he shall not be allowed afterwards to have a new action for the same battery, though it be for other damages, as for a laceravit, maihem &c.; but the defendant shall plead the former recovery in bar, and aver it to be for the same cause, and it shall be a good bar, though it be shewn that the new damage accrued since the first action (*a*). So the plaintiff shall not have an action of trespass for digging under the foundation of his house, *per quoad* it fell, and he lost all benefit and profit of his house; and another action upon the case for digging so near to his house, that it fell, and he was compelled to quit it, together with his trade, if it appear that the digging is the same in both; for the words "that he lost all benefit and profit of his house," in the first action, include the trade of his house and the damages for the loss of it in the second (*b*). So for the same words the plaintiff shall not have a new action by a new interpretation of them (*c*). And even where the action is of a higher nature, it shall be barred by a recovery in an action of an inferior nature, as an appeal of maihem shall be barred by an action for the battery and wounding (*d*). In like manner, in the case at bar, the cause of action being for dilapidations to the rectory by the last incumbent, for which the plaintiff had already recovered damages in respect of several parts of the rectory, and as the damages to the other parts might all have been included in that recovery, he should not be permitted to split the damages, and to maintain a new action for the same cause, by alleging a new damage. And great hardship, he insisted, would ensue if it were otherwise, for then the defendant might be harassed with as many actions as there are divisible portions of damage, as for the damage in each room of the house, or in each acre of the glebe &c.

Mr. (now Sir *James*) *Scarlett*, on the contrà, denied that the former action was for the same cause as the present; an

(*a*) *Fetter v. Beale*, Salk. vol. i. p. 11.

(*b*) *Barwell v. Kinsey*, Lev. vol. iii. p. 169, wherein Chief Justice Jones held that the recovery in the former action was no bar to the present, but the other three Justices, Wyndham, Charlton and Levinz, held the con-

trary, as did afterwards Justice Street, who succeeded Wyndham on his death, when judgment was given for the plaintiff.

(*c*) *Gardner v. Helvis*, Lev. vol. iii. p. 248.

(*d*) *Hudson v. Lee*, Rep. vol. iv. p. 43. S. C. Leon. vol. i. p. 318.

injury to the house and glebe, being a distinct cause of action from an injury to the chancel and pew. And he relied on *Seddon v. Tulop* (a) and *Hitchin v. Campbell* (b).

*Lord Ellenborough, C. J.*—There seems to be no doubt in this case. If the defendant could make out that an injury caused by dilapidations was one entire identical injury, forming precisely the same cause of action for every part of it, then he would be right that the plaintiff could have but one action for it. But I have not heard any authority cited to that effect, nor does it appear to me that there is any reason why this should be considered as one entire cause of action compounded of the several injuries sustained in the several parts. There are different and independent injuries in respect of the different parts; the injury from the dilapidation of the house is one thing, that from the dilapidation of the chancel is another; and the causes are distinct; the latter might not be consummate at the time when the first was. It seems to me therefore that the plaintiff may maintain this action as convenience or subsequent discoveries enable him. It is to be regretted, indeed, said his lordship, that two actions should be necessary, but if what has been suggested at the bar, that the defendant would not consent at the trial of the former action to the chancels being included, be correct, this second action may be laid to his fault.

*Le Blanc, J.*—If the omission to repair one house could be considered as an omission to repair another, the defendant's argument would be well; but that cannot be. And as to the hardship, the court will always interfere if they see that the action is brought for oppression's sake.

*Bayley, J.*—In assault and battery, the injury is not the ground of action, according to *Lord Holt* (c), but the measure of the damages, which the jury must be supposed to have considered at the trial; the injurious act, which is the battery, is the ground of action.

*Per Curiam.*

Judgment for the plaintiff.

(a) Term Rep. vol. vi. p. 607.

(b) Blackst. Rep. vol. ii. p. 827.  
and S. C. in Wils. vol. iii. p. 304.

(c) See *Fetter v. Beale*, Salk. vol. i. p. 11.



## No. III.

Cutting down timber growing on the patrimony of the church, other than for necessary repairs, a dilapidation, and a good cause of deprivation (a).

STOCKMAN v. WITHER.

STOCKMAN  
v.  
WITHER,  
Rolle's Rep.  
vol. i. p. 86.

*Prohibition dilapidation quia Evesque vende Timber.* Inter Stockman and Wither que justifie en droit del Evesq; de Sarum, sur evidence fuit dit per Coke, que 2 H. 4. & 10 E. 4. sont que un wast ou dilapidation del mease del Evescherie est bon cause de deprivation del Evesque, et il dit que il ad vüwe un Record lou fuit move en parliament que l'Evesque de Durham ad succide et vende mults timber arbers et nemy pur le reparation del mese, et le Parliament dit que un prohibition duisoit estre grant hors del Bank le Roy a luy, et un prohibition apres fuit la grant accordant, et semble que ceo est bon ley, car ceo est le Dowrie del Eglise et le Roy est Patron del Evescherie, et pur ceo si cest Evesque de Sarum succide et vende les arbers et ne eux imploie pur reparation si ascun home voilt ceo mover jeo voille grant un prohibition, et l'auters Justices semble d'agreer al ceo.

## No. IV.

Prohibition to restrain bishops &c. from committing dilapidations will lie in the courts of common law (a).

KNOWLE and others v. HARVEY.

KNOWLE  
v.  
HARVEY,  
Bulstr. pt. iii.  
p. 158.  
Rolle's Rep.  
part i. p. 353.

In this prohibition the case appeared to be this; namely, the vicar of the parish of Alesbury, in the county of Devon, lopped and cut down several large timber trees that were growing in the church-yard, for other purposes than those of repairing the church and its buildings. The churchwardens hindered him from carrying the same away, and being in trial of this suit, in the 13th James 1; the churchwardens by their counsel moved the court for a prohibition to the vicar, to stay him from felling any more.

Coke, C. J.—This is a good cause of deprivation, if he fell down timber trees and wood, *this is a dilapidation*, and by the resolution in parliament, *a prohibition by the law shall be granted, if a bishop fells down wood and timber trees.*

(a) See the Treatise, page 3.



The whole court agreed clearly in this, to grant here a prohibition to the vicar, to inhibit him not to make spoil of the timber, this being, as it is called in parliament, the endowment of the church.

*Coke, C.J.*—We will also grant a prohibition to restrain bishops from felling the wood and timber trees of their churches.

And so in this principal case, *by the rule of the court a prohibition was granted.*

The KING  
v.  
ZAKAR,  
Bulst. part iii.  
p. 91.

So also in the case of *The King v. Zakar and others*, in the same year, where the vicar continued in possession, and committed great waste by pulling down glass windows, pulling up planks &c. the court was applied to for an attachment against him for contempt; the Chief Justice, *Coke*, said, we cannot grant this, because, that after judgment here by us given against him, this his staying in possession was by assent of the parties, but not by the rule of the court, for if it had been so, then there had been a good ground for an attachment; you may have a *via Laica removenda*, but not in this case here, *because he is a parson*. But you may have your remedy by way of indictment of forcible entry, or by an *ejectione firmæ*. But here *you may have a prohibition*, and this you may have, not only for the patron, but also for any for the second incumbent, for this is the king's writ; and any one may have a prohibition for the king. Also here, *this is the dower of the church, and we will here prohibit them, if they fall and waste the timber of the church, or if they pull down the houses; and therefore by the rule of the court in this case, a prohibition was granted to stay the doing of any waste.*

#### No. V.

Copy of a writ of consultation (a).

Consultatio de defectibus in Rectoria repertis.

A writ of consultation,  
Reg. Brev.  
fo. 48 a.

Rex, offic' &c. salutem. Monstravit *W. de la Blount* persona ecclesiæ de *P.* quòd cùm ipse nuper petivisset coram vobis in curia Christianitatis *Edwardum* executorem testamenti *Johannis Golde* ultimi rectoris ecclesiæ præd' in quindecim libris per defectibus in cancella, libris et ornamentis ecclesiæ præd', ac in edificiis et manso rectoriæ ejusdem repertis, post mortem ejusdem *Johannis* legitime taxatis condemnari: idem *E.* cognitionem, quæ &c. impedire asserensque &c. vel matrimonio: quandam prohibitionem nostram &c. et gravamen. Et

(a) See the Treatise, page 9.

quia nolumus &c. vobis significamus quòd in causa illa quatenus de damnis pro defectibus hujusmodi taxatis coram vobis agitur, ulterius licite, procedere poteritis, prout ad forum ecclesiasticum noveritis protinere prohibitione nostra prædicta non obstante. T. &c.

## No. VI.

Prohibition of a suit for dilapidations, after being barred in the Temporal Court for the same (a).

## OKES v. ANGE.

This case was that of an application to the Court of Common Pleas, in the 6th of Will. 3, for a prohibition of a suit in the Ecclesiastical Court for dilapidations; on a suggestion, that the plaintiff had at another time brought an action on the case, in this court, for the same dilapidation *ad damn'* 100*l.* To which the then defendant (now become plaintiff) pleaded a tender of 10*l.*, which was sufficient to repair the dilapidations. Whereon, the then plaintiff (now become defendant) took issue that the 10*l.* was not sufficient, and a verdict that it was sufficient, and judgment thereon had; which he now pleaded in bar in the Ecclesiastical Court, and they refused to receive it, whereupon *a prohibition was here prayed and granted*: for the plaintiff in the Ecclesiastical Court, having been barred of dilapidations at the common law, it shall bar him from suing in the Ecclesiastical Court; and of that opinion were the whole Court of Common Pleas, *and granted the prohibition*: but as *Treby*, the Chief Justice, doubting, it was adjourned to the following Term.

OKES  
v.  
ANGE,  
Lev. part iii.  
p. 413.

## No. VII.

1. Form of the consent of the ordinary and patron, for building or repairing the parsonage-houses;—2. Appointment of a nominee for building or repairing the same;—3. Form of order of the ordinary, patron and incumbent, for laying out or applying the surplus money;—4. Form of certificate of due repair or want of repair, dilapidations &c.;—5. Form of statement of accounts for building or repairing;—6. Form of allowance of nominee's account of the money received and expended for building or repairing &c.—7. Form of receipt for such money;—8. Form of bond for such purpose;—9. Form of condition of the said bond (b).

1. Form of the consent of the ordinary and patron [*to be written on parchment.*]

A. B. rector, vicar &c. [*as the case shall be*] of the parish, chapelry or perpetual curacy [*as the case shall be*] of—,

(a) See Treatise, page 10.

(b) See Treatise, p. 13.



in the county of —, under the jurisdiction of the ordinary, having produced to us the said ordinary and — patron of the said church and living, a certificate under the hand of —, a skilful and experienced workman or surveyor, of the state and condition of the buildings upon the glebe belonging to the said church, chapelry, or perpetual curacy [*as the case shall be*], and of the value of the timber, and other materials thereupon, fit to be sold, or employed about such buildings; and also a plan made by the said —, of the work proposed to be done by new buildings and repairs upon the said glebe, and an estimate of the expense attending the same, after applying the said materials, or the money to arise from the sale thereof, in such buildings and repairs; and also a particular account in writing signed by the said A. B. of the annual profits of such living, and of the rents, stipends, taxes, and other outgoings annually issuing thereout, verified upon oath, pursuant to the directions of an act passed in the seventeenth year of the reign of his Majesty King George the Third, *To promote the residence of the parochial clergy, by making provision for the more speedy and effectual building, re-building, repairing or purchasing houses and other necessary buildings and tenements for the use of their benefices*; and having considered such certificate, plan and account: now we do approve thereof; and do consent that such buildings and repairs shall be made as therein specified, and that the said A. B. do borrow and take up at interest the sum of —, being the estimate of the expenses, after deducting the value of the timber and other materials thought proper to be sold, and which appears to us, from the said account, a sum not exceeding two years neat income and produce of the said living; which money is to be paid to — (a person nominated by us and the said A. B.) and applied according to the direction of the said act.

2. Appointment of the nominee [*to be wrote on parchment.*]

We, whose names are subscribed, being the ordinary, patron and incumbent of the rectory, vicarage &c. of —, within the county of —, and diocese of the bishop of —, to receive the money authorised to be raised by an act passed in the seventeenth year of the reign of his Majesty King George the Third, intituled, *An act to promote the residence of the parochial clergy, by making provision for the more speedy and effectual building, re-building, repairing or purchasing houses and other necessary buildings and tenements for the use of their benefices*, for the purpose of building, re-building, repairing or purchasing the parsonage-house &c. [*as the case shall be*] to the said rectory, vicarage &c. belonging, and to pay and apply the same, and to enter into contracts with proper persons for such buildings or repairs, and to inspect and take

care of the execution of such contracts, and to take such receipts and vouchers, keep such accounts, and do and perform all such other matters and things which nominees are authorised and required to do and perform in and by the said act, the said — having given security for the due application thereof, according to the direction of the said act. Given under our hands, this — day of —.

3. Form of order of the ordinary, patron and incumbent, for laying out or applying the surplus money.

We, whose names are subscribed, being the ordinary, patron and incumbent of the rectory, vicarage &c. of —, in the county of —, and diocese of the bishop of —, do hereby order that the sum of — now remaining in the hands of —, the person nominated and appointed to receive and apply the money raised for building, repairing &c. the parsonage-house, &c. belonging to the said rectory, vicarage &c. under the act of parliament passed in the seventeenth year of the reign of his Majesty King George the Third, intituled, *An act to promote the residence of the parochial clergy, by making provision for the more speedy and effectual building, re-building, repairing or purchasing houses and other necessary buildings and tenements, for the use of their benefices*, shall be [paid to —, being the person entitled to receive the money now remaining due on the mortgage made of the glebe lands, tithes and other profits and emoluments of the said living, and applied in part of payment thereof, pursuant to the direction of the said act] or, [applied in building or repairing &c. [describing the same] upon the glebe belonging to the said living]. Given under our hands, this — day of —.

4. Form of certificate from the two clergymen.

We, the Reverend A. B. of —, in the county of —, clerk, and C. D. of —, clerk, being two clergymen within the diocese of the bishop of —, do hereby certify to the said bishop, pursuant to the directions and instruction sent by him to us, that we have made inquiry into the state and condition of the building upon the glebe belonging to the rectory, vicarage &c. of —, within the said diocese, at the time the Reverend —, clerk, the present incumbent thereof, entered upon the said living, which was in or about the year of our Lord —, and do find [that the same have been kept in due and common repair, without any wilful neglect (*if the case is so*) or, [that the same have, by wilful negligence, been suffered to go to decay, and that they have sustained damage, from a want of common and ordinary repair, to the amount of — pounds] and we have also inquired into the money received by the said —, for dilapidations, from the



representatives of the former incumbent, and do find that he hath received the sum of — for such dilapidations; and that he hath expended the whole, *or*, — thereof [*as the case may be*] in the necessary repairs of the buildings] *or*, [that the same hath not been laid out or expended in repairing the buildings] upon the glebe belonging to the said living. Given under our hands, this — day of —.

5. Form of statement of accounts for building or repairing.

State of account of the money advanced and paid by A. B. [rector *or* vicar &c. *as the case shall be*] of the living of —, in the county of —, for the building [re-building *or* repairing] the parsonage-house and buildings belonging to the said living, according to the direction of a statute made in the seventeenth year of the reign of his Majesty King George the Third.

C. D. ordinary.  
E. F. patron.  
G. H. incumbent.

6. Form of allowance of the nominee's account of the money received and expended by him pursuant to the directions of the statute of the seventeenth year of King George the Third [*to be written at the foot of such account.*]

We have examined, and do hereby approve and allow the above account. Given under our hands, this — day of —.

A. B. ordinary.  
C. D. patron.  
E. F. incumbent.

7. Receipt to be signed by the nominee for the money which shall be borrowed and paid into his hands, pursuant to the direction of the said act.

I, A. B. being the person nominated by the ordinary, patron and incumbent of the rectory [vicarage &c. *as the case shall be*] of —, in the county of —, and diocese of the bishop of —, to receive and apply the money authorised to be borrowed by mortgage of the glebe, tithes, rents and other profits and emoluments of the said —, for the purpose of building [re-building *or* repairing, *as the case shall be*] the parsonage-house [or, out-buildings &c. *as the case shall be*] belonging to such living or benefice, do hereby acknowledge to have received from the hands of C. D. being the person to whom such mortgage is intended to be made, the sum of —, being the sum for which such mortgage or security is to be made: And I do hereby promise to apply the same in such manner and for such purposes as are directed by the said act.

8. Form of bond to be given by the nominee and his surety, pursuant to the direction of the said act.

Obligation of the bond [*in the common form of obligations*] from A. B. [*describing him as in the last form of receipt*] and C. D. of &c. [*describing the surety*] to — [*describing the ordinary*] in the penal sum of — [*to be double the sum for which the security is to be given &c. &c.*]

9. Form of the condition of the said bond.

The condition of the above obligation is such, that if the said A. B. [*naming the nominee, as before mentioned*] shall and do justly and truly pay and account for the sum of — received by him this day from C. D. being the person to whom a mortgage hath been this day made and executed of the glebe, tithes, rents and other profits and emoluments of the rectory [*vicarage &c. as the case shall be*] of —, for the purpose of building [*re-building or repairing*] of the said rectory &c. [*as the case shall be*], according to the true intent and meaning of two several acts of parliament, passed in the seventeenth and twenty-first years of the reign of his Majesty King George the Third, for those purposes; then this obligation to be void, or otherwise to remain in force.

A. B.  
C. D.

#### No. VIII.

Lord *Hardwicke's* opinion of the canon law (a).

This learned and celebrated argument upon the power and value of the canon law, was made by Lord *Hardwicke*, in delivering the opinion of the whole Court of King's Bench, in Michaelmas Term, 10 Geo. 2. A. D. 1737, when he was Chief Justice, and Sir *Francis Page*, Sir *Edmund Probyn*, Knights, and *William Lee*, Esq. Justices, in the case of *John Middleton* and *Anne* his wife *v. Thomas Crofts*.

Lord Chancellor *Hardwicke's* opinion on the canon law, Atk. Rep. vol. ii. p. 650.

After much preliminary matter, as to the substance of the pleadings, and arguments of the counsel, which are not to our immediate purpose, the declaration alleged, that the *Court Christian* hath no jurisdiction or cognizance of this matter, and that it is a mere temporal offence, punishable by the statute; that the plaintiffs delivered to the defendant the king's writ of prohibition; but notwithstanding that, the defendant continues to prosecute the plaintiffs in the said court, in contempt of the king, to the damage of the plaintiffs, and contrary to the said writ of prohibition.

(a) See the Treatise, page 21.

Lord Hardwicke's opinion on the power of the canon law.

The cause had been several times argued, and three questions had been made at the bar. The second and third only relate to our subject, and are as follows:

Secondly, *If lay persons cannot be prosecuted or punished by force of these canons, whether the court had jurisdiction of such a cause against them by the ancient canon law, received and allowed within the realm of England.*

Thirdly, *Supposing the Spiritual Court had a jurisdiction on either of those grounds, whether that jurisdiction is taken away by the operation of the statute 7 & 8 Will. 3. cap. 35. § 4, which inflicts a penalty of 10l. for this offence, to be recovered in the King's Court.*

After discussing the first question, which relates merely to marriages, his lordship arrives to the general principle of the power of the Court Spiritual, and says,

But supposing lay persons might be within the words of the canons in 1603, the next consideration is, whether the authority by which those canons were made, can bind the laity as to this matter. The authority whereby they were made, is well known to have been by the bishops and clergy, in convocation convened by the king's writ, allowed to treat of and make canons by the royal licence, and afterwards confirmed by the king under the great seal; but the defect objected to them is, that they never were confirmed by parliament, and for this reason, though they bind the clergy of this realm, yet they cannot bind the laity.

This is a question, said his lordship, of very extensive learning and great consequence, upon which there is some appearance of variety in the law books, notwithstanding which, I always understood, till it was disputed in this cause, that the law in latter times has been universally taken to be, that the canons of 1603 did not bind the laity for want of a parliamentary confirmation.

And upon this ground, I presume, it was, my brother Wright (that argued last for the defendant in this cause, who is plaintiff in the Ecclesiastical Court) expressly admitted, *that these canons did not proprio vigore bind the laity*, and insisted only on the second point, *that the ancient usage of the Church of England, and the ancient canons, received by and allowed in this nation, do bind them.*

But as the contrary doctrine was insisted on by the other counsel, who argued on the same side, and had a right to urge every thing which they thought material for their client, it



is become necessary to examine and determine a point of so great a consequence to the constitution of England, in order to settle the law thereupon.

Lord Hardwicke's opinion on the power of the canon law.

And, upon the best consideration we have been able to give it, we are all of opinion, that the canons of 1603, not having been confirmed by parliament, do not *proprio vigore* bind the laity; I say *proprio vigore*, by their own force and authority; for there are many provisions contained in these canons, which are declaratory of the ancient usage and law of the Church of England, received and allowed here, which, in that respect, and by virtue of such ancient allowance, will bind the laity; but that is an obligation antecedent to, and not arising from, this body of canons.

The court of opinion the canons of 1603, not having been confirmed by parliament, do not *proprio vigore* bind the laity.

In treating of this question, said this learned Judge, it might serve for illustration and ornament, to look back into the history of the ancient councils of this island, in the British and Saxon ages; but any one who will be at the trouble of looking through Sir Henry Spelman's laborious collection on this subject, will find that it would furnish very little materials towards fixing the point of law as to the obligations of canons, because those councils were frequently mixed assemblies composed partly of clergy, partly of laymen, and sometimes of the king, with his nobility, and at other times some of the commons are mentioned to be present; but whether they had suffrages in those councils or not, and in what manner they were sent thither, whether by election, or by what other kind of constitution, is very uncertain and obscure.

The reasons upon which they founded their opinion.

The like may be said of several councils held in the earliest times, following the coming in of the Norman Line; and afterwards there is frequently a mixture of the legatine authority, which arose merely by papal usurpation.

Upon this important question, therefore, it is safest for judges to proceed upon sure foundations, which are, the general nature and fundamental principles of this constitution, acts of parliament, and the resolutions and judicial opinions in our books, and from these to draw our conclusions.

To argue first, from the general nature and fundamental principles of this constitution, nothing is so undoubtedly such, as that no new laws can be made to bind the whole people of this land, but by the king, with the advice and consent of both houses of parliament, and by their united authority; neither the king alone, nor the king with the concurrence of any particular number or order of men, have this high power. To cite authorities for this would be to prove that it is now day, and therefore I will only refer to the Parliament Roll, 2 Hen. 5. Pars. 2. No. 10; and the case of Proclamations, 12 Rep. 74.

No new laws can be made to bind the whole people, but by the king, with the advice and consent of both houses of parliament, and by their united authority.



Every man may be said to be party to, and the consent of every subject is included in an act of parliament; but in canons so made in convocation and confirmed by the crown only, all these are wanting, except the royal assent.

The binding force of these acts of parliament, arises from that prerogative which is in the king, as our sovereign liege lord, from that personal right which is inherent in the peers and lords of parliament, to bind themselves, and their heirs and successors in their honors and dignities, and from the delegated power vested in the commons, as the representatives of the people, and therefore Lord *Coke* says (a), these represent the whole commons of the realm, and are trusted for them by reason of this representation, every man is said to be party to, and the consent of every subject is included in an act of parliament; but in canons made in convocation, and confirmed by the crown only, all these are wanting except the royal assent; here is no intervention of the peers of the realm, nor any representation of the commons.

Indeed, Dr. *Andrews* endeavoured to avoid the force of this objection, by observing, that the obligation of an act of parliament did not arise from the actual representation of all the people of the land, but from an implied representation constituted by the law, for that, in fact, many ranks of men among the commons had no votes in the election of members in that house, and the minister of every parish in England has the care, and is the representative of his particular parish in matters spiritual, and votes in election of proctors for the clergy.

The fact is undoubtedly true, that many amongst the commons have no votes, as persons having no freeholds, freeholders in the ancient demesne, women &c. but that does not make it cease to be an actual representation of the people. No body ever imagined, that in exercising a right of this kind, every individual person could possibly join, but some rule of qualification must be laid down, and that hath been taken from the most worthy, and such as have the most valuable and mixed sort of property, which also, to avoid confusion, hath been restrained by latter acts of parliament.

But it is quite a new notion, said Lord *Hardwicke*, unheard of in the law books, or in any writer upon our constitution, that the rector or vicar of a parish is the representative of his parish, in voting for convocation-men: Who chose this representative of theirs? Not the parish themselves, but the bishop of the diocese, or some lay patron. Could this bishop of the diocese, or the lay patron, delegate a power for the parishioners to bind them in any act of legislation? Surely it never entered any body's head that they could do it. But, not to dwell upon this novelty, it is contrary to the very writ constantly issued to the metropolitan to summon his convocation, the words of which are *Convocari facias totum clericum cujuslibet diocesis*

(a) 4 Inst. 1.



*vestræ provinciæ.* It is contrary also to the premunitory clause in the writ of summons to every bishop, which directs in a more particular manner, who of the clergy shall come in person, and who by their representation, in this form: *Quod decanus et archidiaconus in propriis personis ad dictum capitulam per unum idemque clericus per duos percuratores idoneos plenam et sufficientem potestatem ab ipsis capitulo et clerico divisim habentes prædictis die et anno personaliter intersint ad consentiendum &c.*

The words and common sense of these writs import, that only the clergy are called; that the proctors of the clergy are merely representatives of the clergy, and have their powers from and for them, without so much as an implication on any thing further. Agreeable to this, Lord *Coke* says (*a*), in *domo convocationis*, the whole clergy of the province are either present in person, or by representation.

In the convocation, the whole clergy of the province are either present in person or by representation.

From hence arises the substantial distinction between the ancient canons, made in general councils of the church, and confirmed by the Roman Emperors after they embraced the Christian Faith, and the canons made either in a national or provincial synod of the Church of England, and confirmed by the crown; as to the extent of their obligation, there is no doubt but the former bound all the subjects of their empire, as well laity as clergy, so far as they were lawful in respect to the subject-matter, but the difference lies in the root from whence the obligation springs.

The binding force of these ancient canons over laymen, was not derived from any particular prerogative or supremacy of the emperors, as head of the church, but from the supreme legislative power being vested in his person, for after the *Lex Regia*, whereby it is said to be ordained, "*Quod principi placuit legis habet vigorem* (*b*)," the whole power of making laws, however originally gained by usurpation, was devolved upon the emperor; and by consequence, when a canon was made by the council, and confirmed by the emperor, it had the concurrence of every thing necessary to make it a complete law.

The binding force of ancient canons over laymen, was derived from the supreme legislative power being vested in the person of the emperors.

But the case is far otherwise in England, where the king has but part of the legislative power, and therefore the argument made use of in the case of *Matthews v. Burdet* (*c*), though it be only the reasoning of counsel, is of great weight, and such as I have heard no satisfactory answer given to.

In England it is otherwise, where the king has but part of the legislative power.

(a) 4 Inst. 322.

sect. 16. Digest, lib. 1. tit. 4. de

(b) Justinian. Inst. lib. 1. tit. 2. constitutionibus principum.

(c) 2 Salk. 673.



The answers which have been offered are two. First, that the reason of the emperors' confirmation of any canon, was only to give it a civil sanction; but though this was said, it was not proved; and I do not find any temporal penalties annexed to the ancient canons of the church.

The other answer was, this argument shews, wherever the law has fixed a power, that includes the consent of the people, it is included in the royal confirmation; but this hath not the shadow of an answer, because it begs the main question, which is, whether the law of England has deposited in the crown the sole power of confirming canons to bind the laity, without the advice and consent of parliament.

Another argument, of like kind with the former, is, that by the English constitution, the power of binding by new laws, and that of charging with taxes, are concomitant and co-extensive, and those who have the authority to do the one, can do the other: Thus the parliament makes laws obligatory upon the whole nation, and they impose taxes to be levied upon all the people: But the clergy in convocation never pretend to have power of granting tenths or fifteenths, or other taxes to charge any persons but themselves; and by analogy from hence, can make no canons or ordinances but only to bind themselves, *i. e.* the body there assembled or represented.

To pursue this argument a little further, and to infer the consequences which naturally result from it, it seems almost an absurdity to say that the clergy in convocation cannot charge the laity with one farthing by way of tax or imposition, cannot even create a new fee to be paid to them, and yet may erect new laws to bind them *in re ecclesiastica*, for disobeying which they shall incur the penalty of excommunication, which is to be carried into execution by a loss of their liberty, and a disability to sue for and dispose of their personal estate; this would certainly be to affect the laity in their property in a high degree; and yet it is admitted that the clergy by their synodical acts, cannot charge the property of the laity.

Ever since the Reformation, the rule has been, that where any ordinances have been made to bind the laity, as well as the clergy, in matters merely ecclesiastical, they have been either enacted or confirmed by parliament.

And again, said Lord *Hardwicke*, the rule of any constitution in a particular case cannot be better found out, than by observing what has been the constant uniform usage and practice in such case. Now the constant uniform practice, ever since the Reformation (for there is no occasion to go further back), has been, that when any material ordinances or regulations have been made to bind the laity as well as clergy, in matters merely ecclesiastical, they have been either enacted or confirmed by parliament; of this proposition the several acts of uniformity are so many proofs, for by those the whole doctrine and worship, the very rights and ceremonies of the church, and the liberal form of public prayers are prescribed

and established ; and it is plain from the several preambles of these acts, that though the matters were first considered upon as an assembly of learned men, able and proper to prepare and propound them, but not to enact and give them their force.

To this way of arguing it hath been objected, that the reason of establishing provisions of this kind by act of parliament, was for the sake of enforcing them by civil sanctions and temporal penalties, which could not otherwise be obtained, and undoubtedly this was one reason for it ; but I cannot be persuaded it was the only reason, since if it had been the prevailing opinion of those times, that the clergy in convocation could make new canons to bind the laity, it is most unaccountable that they should not think it proper to trust any regulation of the most minute consequence to the proper force of a canon or synodical decree, which if lawfully made might be carried into execution by excommunication, and the consequences attending upon it fully sufficient to enforce it.

Upon one of the arguments of this cause at the bar, it was, though not in words asserted, yet endeavoured to be proved, that the legislative power of the clergy in convocation is co-extensive with the judicial power of the Spiritual Courts, and that therefore, as the Spiritual Courts had an allowed jurisdiction over the laity relating to marriages. This has been expressed in other words, that their canons are binding on clergy and laity without distinction *in re ecclesiastica*, that is, in ecclesiastical matters, or what according to the law of the land hath been reckoned of a spiritual nature.

But in this argument, a great deal too much is assumed ; for the Spiritual Court has undoubtedly jurisdiction for matrimony, and testaments, commission of administration of personal estates, tithes, and certain crimes, which are all deemed in law in some degree of a spiritual or ecclesiastical nature ; and yet if this argument was true, it would equally follow, that they might make canons to limit the degrees of consanguinity, within which marriage may be contracted, to fix solemnities of making testaments concerning personal estates, to regulate the rights of administrations, and of tithes, and to ascertain the circumstances and evidences of those crimes, especially in things not already fixed by particular statutes ; what consequence would this have ? Every body sees how it would enable them without consent of parliament, to change the law relating to the heirship and descents of lands, and likewise relating to personal estates, which are come of prodigious value, and relating to the payment of tithes, which much concerns temporal interests and property, and also as to several crimes whereby the personal liberty of the subject may be conse-

Lord Hardwicke said, the attempt of counsel to make the power of the convocation, in ordaining canons, co-extensive with the judicial authority of their courts, is full of so much mischief, that it cannot be contended for with any shadow of reason or of law.

quentially effected upon their significavit. This attempt, therefore, to make the power of the convocation in ordaining canons, co-extensive with the judicial authority of their courts, is full of such strange consequences, and so much mischief, that it cannot be contended for with any shadow of reason or of law.

In truth, said his Lordship, ever since the Reformation, and for some time before, when any alteration hath been made in the law upon any of those points, it hath been done by act of parliament; witness the 32 Hen. 8. c. 38, about the degrees of marriage; the 21 Hen. 8. c. 5, and the 22 & 23 Car. 2. c. 10, relating to administration and the distribution of intestate's estates, and several others which might be enumerated.

If this doctrine had been law, continued his Lordship, at the time of making the statute of Merton, 20 Hen. 3, the bishops would have had no occasion to apply to parliament to change the law of England, by legitimating issue born before marriage, as they had the jurisdiction to try general bastardy, or whether a child was a bastard or mulier, as is expressed in 2 Rol. Abr. 586, pl. 25, they might have done it themselves; and though the Lords with one voice, gave that memorable answer, *Nolumus leges Angliæ mutari*, the clergy in convocation might have done it by a new canon.

He then, after much luminous discussion, came to the second head of argument proposed on this question, which was statute law; and as he did not find that any positive declaration of the law, had ever been made by act of parliament upon that particular point, so that all that could be expected from them were implications and inferences, from whence the sense of the legislature might reasonably be collected.

The acts of uniformity &c. since the Reformation, furnished proofs, he said, that the parliament had from that period been of opinion, that the power of making constitutions in ecclesiastical matters, to bind the whole nation, was in them.

The only act, he continued, made *ex professo* upon the subject of the canons, is that of the 25 Hen. 8. c. 19, intituled, "The submission of the clergy, and restraint of appeals," whereby power was given to that king to appoint thirty-two persons to review and reform the ecclesiastical laws, which power was continued by the several subsequent statutes of the 27 Hen. 8. c. 15. the 35 Hen. 8. c. 16, and the 3 & 4 Edw. 6. c. 11, but was never completely carried into execution. These acts of continuance are not printed in the latter editions of the *Statute Book*, but are all in *Rastall's Statutes at Large*.

But even this statute, says this luminous expounder of the law, is in the words of it silent as to the persons over whom the obligation of the canons may extend. It begins with an humble acknowledgment of the clergy, according to the truth, "that the convocation is, always hath been, and ought to be assembled only by the king's writ; that they promise *in verbo sacerdot*; that they will never from henceforth presume to attempt, allege or claim, or put in use, enact, promulge or execute any new canons, constitutions, ordinances, provincial or other, unless the king's royal assent and licence may be had, to make, promulge or execute the same, and that his majesty do give his royal assent and authority in that behalf." Upon these recitals it enacts, "that the clergy, nor any of them from thenceforth, shall presume to attempt to allege, claim or put in use, any constitutions or ordinances provincial or synodal, or any other canons, nor shall enact, promulge or execute any such canons, constitutions or ordinances provincial, by whatsoever name or names they may be called in their convocation in any time to come (which always shall be assembled by authority of the king's writ), unless the same clergy may have the king's most royal assent and licence, to make, promulge and execute such constitutions provincial or synodal; upon pain of suffering imprisonment; and making fine at the king's will."

The statute law silent as to the persons over whom the obligations of the canons extend.

It enacts further, "That the king's highness shall have power and authority to nominate and assign at his pleasure thirty-two persons of his subjects, half whereof, sixteen, to be of the clergy, and half of the temporality, of the upper and nether house of parliament, who shall have authority and power to view, search and examine the said canons, constitutions and ordinances, provincial or synodal, heretofore made; and such of them as the said thirty-two persons, or the more part of them, shall deem and adjudge worthy to be continued, kept and obeyed, shall be from henceforth kept, obeyed and accepted within this realm, so that the king's royal assent be first had to the same; and the residue of them, which the king's highness and the said thirty-two persons, or the more part of them, shall not approve, or shall deem worthy to be abolite, abrogate and made frustrate, shall from thenceforth be void and of none effect, and never be put in execution within this realm: Provided that such canons and constitutions and ordinances, provincial or synodal, being already made which be not contrariant nor repugnant to the laws, statutes and customs of this realm, nor to the damage or hurt of the king's prerogative royal, shall now still be used and executed as they were before the making of this act, till such time as they be viewed, searched, or otherwise ordered and determined by the said thirty-two persons or the more part of them, according to the tenor, form and effect of this present act."

IN THIS MANNER AND THE SEVERAL ACTS OF CONTINUANCE, NOTHING REMAINS AS WAS MENTIONED BEFORE, REACHING THE PERSONS OVER FROM THE OBLIGATION OF CHURCHES MAY EXTEND; BUT NOTWITHSTANDING THAT THE OBSERVATIONS ARE UPON THEM, SAID HIS LORDSHIP, INDEED IN THE PRESENT DISPOSITION.

I have been told that the king and the clergy thought it necessary, it is less very expedient to take along with them the continuance and authority of parliament, for abrogating part of the ancient customs, and for confirming and establishing such part as was to remain in force. If the opinion had then prevailed, that the parliament, with the consent of the crown, could have retained powers to bind the whole realm, laity as well as clergy, the king with the archbishops who had just then given the strongest evidence of their submission to his will might have found many and easy ways of doing it, without resort to parliament. But the wisdom of those times chose to rely upon this other method.

First, that both the king and the clergy thought it necessary, it is less very expedient to take along with them the continuance and authority of parliament, for abrogating part of the ancient customs, and for confirming and establishing such part as was to remain in force. If the opinion had then prevailed, that the parliament, with the consent of the crown, could have retained powers to bind the whole realm, laity as well as clergy, the king with the archbishops who had just then given the strongest evidence of their submission to his will might have found many and easy ways of doing it, without resort to parliament. But the wisdom of those times chose to rely upon this other method.

Nothing is more certain than that the king and the clergy thought it necessary, it is less very expedient to take along with them the continuance and authority of parliament, for abrogating part of the ancient customs, and for confirming and establishing such part as was to remain in force. If the opinion had then prevailed, that the parliament, with the consent of the crown, could have retained powers to bind the whole realm, laity as well as clergy, the king with the archbishops who had just then given the strongest evidence of their submission to his will might have found many and easy ways of doing it, without resort to parliament. But the wisdom of those times chose to rely upon this other method.

Secondly, if the design of reviewing and reforming the ancient custom law, by parliament, were authorized by those acts of parliament, and were afterwards carried into execution, every body must have imagined that the system of ecclesiastical law which they had approved would have derived its binding force over the whole realm from the legislature; for nothing is more certain than that the king and the clergy thought it necessary, it is less very expedient to take along with them the continuance and authority of parliament, for abrogating part of the ancient customs, and for confirming and establishing such part as was to remain in force. If the opinion had then prevailed, that the parliament, with the consent of the crown, could have retained powers to bind the whole realm, laity as well as clergy, the king with the archbishops who had just then given the strongest evidence of their submission to his will might have found many and easy ways of doing it, without resort to parliament. But the wisdom of those times chose to rely upon this other method.

Lord Hardwicke then proceeded to consider the resolutions and judicial opinions in the books upon this great question, which, from its importance to our subject, I shall give a correct abstract of such parts as refer to my immediate subject, reserving my readers for the arguments, to the case at length, as reported by Cursitor Baron Atkyns.

The first case that his Lordship cited, and mentioned as the first ever cited on the subject, was that of *The Prior of Leeds*, in the 27th Hen. 6. 12 abridged by Sir Robert Brooke (b). In this case it was laid down, that the ordinary by his convocation had power to make constitutions provincial, by which (*Ceux de Sainte Eglise*) shall be bound, but they cannot do any thing to bind the temporality.

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(a) Henry the 8th.  
(b) Brooke's (Sir Robert) Abridgment of the Law, chiefly compiled from the Year Books, fo. 1373 and 1386. tit. Ordinary, l.

The prior came into the Court of Exchequer and exhibited letters patent of exemption, and prayed their allowance. The case was adjourned into the Exchequer Chamber, before the Lord Chancellor, and all the Judges. On this occasion, *Hodges*, who was then Chief Justice of the King's Bench, said, that "in respect of what had been insisted, that the prior should have an allowance of his letters patent in the convocation, it was nothing to the purpose, for they had power of things spiritual." Upon which *Newton*, one of the Judges of the Common Pleas, said, that "the ordinary, by his convocation, had a power to make fasting-days and holy-days, but not to allow or disallow the king's patent."

The next case in order of time, said his Lordship, was that of *The Abbot of Waltham*, M. 24 E. 4. 44 b. in which the very same point came again in question, before all the Judges in the Exchequer Chamber, upon the like letters patent of exemption granted to that abbey, it was said, that *the convocation had not power to bind any temporal matter, but only that which is spiritual.*

*The Abbot of  
Waltham's  
Case.*

On these two cases his Lordship observed, that the words *la temporalitie* in this case ought to have no strses laid upon them, for though they are in the last edition of the Year Book, which only had been consulted in framing some objections, it is false printed, for he had looked into the old edition, and found them to be *le temporalitie*, in the masculine gender, as Sir *Robert Brooke*, who probably transcribed it from the original edition, has quoted it, and therefore, he said, this criticism fell to the ground.

He also observed, that Justice *Newton*, in the before quoted opinion, which he gave on the power of the convocation, meant temporal persons as well as temporal things, because it is plain by the opposition of it to *Ceux de Sainte Eglise*, which are words signifying the persons, not the matters or rights of holy church; for so Sir *Robert Brooke* construed those old French words, using *le clergy* in his abridgment of the case as a synonymous term for them.

When the case of *The Abbot of Waltham* came before all the Judges in the Exchequer Chamber, *Vavasor* said, that the power of the convocation doth not extend over the temporal rights of the clergy themselves, and that the abbot's claim of exemption from collecting tenths, being a temporal right, he, though a clerk, was not bound.

The next case, said his Lordship, is called *The Convocation Case* (a), and the like opinion is there laid down, founded

*The Convoca-  
tion Case.*

(a) Co. Rep. part xii. fo. 72.



on these two *Year Book* cases which are there cited. There is, indeed, he said, an exception at the end of the case *relating to spiritual causes*, or which concerns spiritual persons, "But that sentence," said his Lordship, "is certainly misprinted, for it is neither grammar nor sense, and therefore no weight to be laid upon it, neither will I attempt to explain its meaning."

*Cawdrie's Case.*  
Lord Coke's opinion as to what canons &c. are still in force.

He next cited *Cawdrie's case (a)*, in which Lord Coke says, "If it be demanded what canons, constitutions, ordinances and synodals provincial are still in force within this realm," I answer, that it is resolved and enacted by authority of parliament, that such as have been allowed by general consent and custom within this realm, and are not contrariant or repugnant to the laws, statutes, and customs thereof, nor to the damage or hurt of the king's prerogative royal, are still in force within this realm, as the king's ecclesiastical laws of the same. Now as consent and custom, said Lord *Hardwicke*, hath allowed these canons, so no doubt by general consent of the whole realm, any of the same may be corrected, enlarged, explained or abrogated.

Conference of all the Judges, in the 2 Jac. 1.

At an assembly (*b*) of the Lord Chancellor *Ellesmere*, the Lords of the Council, and all the Justices of England, held in the Star Chamber, it was held that the king, without parliament, as head of the church, and having supreme power ecclesiastical, might make ordinances and constitutions for the government of the clergy, and might deprive them if they did not obey; but without the king, the clergy could not make constitutions.

*Case of the Bishop of St. David.*

In the great case, said his Lordship, of *The Bishop of St. David and Lucy (c)*, Easter Term, 11 W. 3, it was laid down by Lord Chief Justice *Holt*, and not denied by any one, that it is very plain, all the clergy are bound by canons confirmed only by the king; but to bind the laity they must be confirmed by parliament. The report of this case, continued his Lordship, in *Salkeld*, 134, is in this point to the same effect, though not quite so full, but as this opinion appeared to be of great weight, he looked into two manuscript reports of the same case, taken by hands of the best ability and credit, he meant the late Lord *Raymond* and Lord Chief Justice *Eyre*, and found that they both agreed with the printed report of Serjeant *Carthew*; the words of Lord *Raymond* are these, "Per *Holt*, C. J. the clergy are subject to a law different from that to which the laity are subject, for they are obliged

(a) Co. Rep. part 5. fo. 32 b.

(b) Moore's (Sir Francis) Reports, Case, 1045; and Croke's (Sir George)

Reports, 37. Trinity, 2 Jac. 1.

(c) Carthew's Reports, fo. 485.

to obey the canons, for the convocation may make canons to bind all the clergy, but not the laity, and if the clergy do not conform to them, it may be a cause of deprivation."

His Lordship then cited the case of *Britton v. Standish* (a), Lord Chief Justice *Holt* agreed with the Justices *Powell* and *Gould*, that they had an original jurisdiction in this matter by the ancient canon law, if there were any ancient canon for it, and received here before 1603; but if not, he held, that no canon since then (1603) though made in full convocation, can *proprio vigore*, bind laymen. *Britton v. Standish.*

In *Davis's case* (b), which he next cited, Lord Chief Justice *King* said, it was the prevailing opinion, that the canons did not bind the laity, without an act of parliament, there being none to represent them in convocation. *Davis's Case.*

Having thus gone through the authorities that had occurred in support of his opinion, his Lordship thought it necessary to consider those that had been produced on the other side, which, he thought, were only *three*.

The *first* was the case of *Bird and Smith* (c), wherein it was said at the end, to have been resolved, that the canons of the church made by the convocation and the king, without the parliament, bind in all matters ecclesiastical as well as an act of parliament; because that a clergyman cannot now be a member of the house of commons, nor a layman of the convocation; and therefore when the convocation makes canons of things appertaining to them, and the king confirms them, they will bind the whole realm. *Bird and Smith, Tr.*  
4 Jac. 1.

To this Lord *Hardwicke* said, that it must be owned, that this case was a very extraordinary case, and the decree made by the Lord Chancellor *Ellesmere*, who heard the cause, assisted by Lord Chief Justice *Popham*, *Coke*, and *Fleming*, C. B. who all concurred therein, was such a one as would not be allowed as a precedent at this day. He added, that there was no colour of law to say, that every bishop in his diocese, archbishop in his province, and the house of convocation in the nation, could make canons to bind within their limits; and that whatever might be the power of convocation to bind the whole realm in matters ecclesiastical, it is no where said in this case they can bind the laity.

The next authority that his Lordship cited, was the opinion of Lord Chief Justice *Vaughan*, in the case of *Hill v. Good* (d), Ld. Chief Justice *Vaughan's* opinion.

(a) Modern Cases, p. 188.  
(b) Mich. 5 Geo. 1. C. B.

(c) Moore, p. 781, Case, 1033.  
(d) Vaugh. Com. Pl. Rep. p. 327.

that a lawful canon is the law of the kingdom as much as an act of parliament. This, said Lord *Hardwicke*, is certainly true, but proves nothing in the present case, because it is silent and does not determine what is necessary to make a lawful canon as to this, or that particular subject, matter or person, which is the point now in debate.

Mr. Justice  
*Tyrrell's* opi-  
nion.

The last case that his Lordship cited, was that of *Grove and Elliott (a)*, Easter Term, 22 Charles 2, wherein Mr. Justice *Tyrrell* held, that the king and convocation, without the parliament, could not make any canons which should bind the laity, although they might the clergy. Lord Chief Justice *Vaughan* differed in this, and said, that the canons of 1603 were certainly in force, though never confirmed by act of parliament; and that the convocation, with the assent of the king under the great seal, might make canons for the regulation of the church, and that as well concerning laics as ecclesiastics, and so was *Lyndewode*; indeed, said he, they cannot alter or refringe the common law, statute law, nor the king's prerogative; all that is required in making new canons is, that they confine themselves to church matters.

Lord *Hardwicke* admitted, that Chief Justice *Vaughan* was of a different opinion from that which the court had then delivered; but he observed that the weight of this authority was much weakened, when it is observed that it was upon a motion without much consideration; that another Judge of the court declared himself of a contrary judgment, and that the other two declared no opinion at all on this question; so that it came only to the opinion of a single Judge against another, and all upon a point not properly in the cause.

Upon stating these authorities, his Lordship considered it to be easy to decide which preponderated. As to the extraordinary anomalous case of *Bird and Smith*, in Chancery, he thought no stress was to be laid upon it, and then there remained only the opinion of Lord Chief Justice *Vaughan*, against which his Lordship opposed the opinions of *Newton, Coke, Tyrrell, Holt*, and *King*, and the answer of all the Judges in the Star Chamber, which carried in it a plain implication of the ground his Lordship then went upon.

The second  
question.

Upon the second question his Lordship held, that the Spiritual Court has a jurisdiction by the ancient canon law in the case of a clandestine marriage, and all the rest of the Judges were of the same judgment.

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(a) Vent. vol. ii. p. 41.

Therefore, here rests, said his Lordship, the sure foundation of all ecclesiastical jurisdiction in this kingdom; and of this a rational and natural account is given in a manuscript treatise of that great and learned Judge, Lord Chief Justice *Hale*, which he had perused, and quoted at length. It is sufficient to our purpose to say, that it lays down, that external discipline of the church could not bind any man to submit to it, but either by force of the supreme civil power, where the governors received it, or by the voluntary submission of the particular persons who did receive it.

The rest of this learned and celebrated argument relating only to the mere matter before the court, is not transcribed; but it may, perhaps, be useful to repeat, that it was made by Lord *Hardwicke* (afterwards Lord High Chancellor), in delivering the opinion of the whole Court of King's Bench, when he was Chief Justice, and Sir *Francis Page*, Sir *Edmund Probyn*, Knights, and *William Lee*, Esq. Justices.

## No. IX.

The celebrated case of MAGDALEN COLLEGE, CAMBRIDGE, as reported by Lord *Coke* (a).

Case of  
MAGDALEN  
COLLEGE,  
CAMBRIDGE,  
Co. Rep. pt. ii.  
fo. 66 b. Roll.  
Rep. part i.  
fo. 151. 277.  
Cro. Rep.  
vol. ii. fo. 364  
Bulst. Rep.  
part ii. p. 146.

This important case was originally an action of trespass and ejectment brought by *John Warren* against *John Smith*, Master of Arts, which began in the Court of King's Bench, Easter Term, 9 Jac. 1. Rot. 288, and it was pleaded that a special verdict was found, and argued at large by counsel on both sides, and at the last in Easter Term, 13 Jac. 1, it was argued by the judges and judgment then given for the defendant, as the same appears at large in Lord *Coke's Reports*, part ii. fo. 66 b, entitled *Magdalen College Case*.

This case was argued at bar, by Sir *Henry Hobart*, then Attorney-General, and afterwards Chief Justice of the Common Pleas, Sir *Henry Montague*, the King's Serjeant, and Sir *George Croke*, for the plaintiff; and by *Yelverton*, the King's Solicitor, and *Thomas Crew*, for the defendant.

The learned Judges of the Court of King's Bench who argued and decided this celebrated cause, were, Lord *Coke*, Chief Justice, Sir *John Croke*, Sir *John Doderidge* and Sir *Robert Houghton*, Knights, Justices; and it is most learnedly reported by the Chief Justice himself in his valuable Reports.

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(a) See the Treatise, pages 6 and 38.

The facts elicited in this case, were, that *John Warren* brought an *ejectione firmæ* against *John Smith*, Master of Arts; declaring on a lease made by *Sir Francis Castillion*, Knight, the 20th December, anno 8 Jac. of an house in London, in the parish of St. Botolph without Aldgate, in the ward of Aldgate, from Michaelmas then last past for two years; by force of which the plaintiff entered, and was possessed till ejected by the defendant.

The defendant pleaded Not Guilty, and the jury gave a special verdict, namely, that long before the trespass and ejection, *Rogerus Kelke Sacræ Theologiæ Professor, Magister, et Socii Collegii Sanctæ Mariæ Magdalene in alimâ academiâ Cantabrigiæ, seisisi fuerint de infrascripto messuagio cum pertinentiâ in dominico suo ut de feodo in jure collegii sui præd.*, and so being thereof seised, 13th December anno nuper *Reginæ Eliz.* 17, by their indenture in English, between the said Queen Elizabeth of the one part, and the said Master and Fellows of the said College of the other part, and enrolled in the Chancery of Record, the said Master and Fellows, "for divers considerations them thereunto specially moving, did give and grant to our sovereign lady the queen, all that their messuage" (which was the messuage mentioned in the declaration) "with the appurtenances, lying in the parish of St. Botolph without Aldgate, London, to have and to hold the said messuage, with the appurtenances, to our said sovereign lady the queen, her heirs and successors for ever; yielding and paying therefore yearly to the said Master and Fellows, and their successors, at the feast of St. Michael the Archangel, 15*l.*" with a clause of distress, and under the following condition, namely, "Provided nevertheless, that if our said sovereign lady the queen, her heirs and successors, shall not sufficiently convey, and assure by letters patent under the great seal of England, the said messuage with the appurtenances unto one *Benedict Spinola*, merchant of Genoa, and his heirs, before the 1st day of April next ensuing, that then this present indenture, and every gift, grant and article therein contained, shall cease and be utterly void, and of none effect;" as appears by the said indenture, whereof one part was sealed with the seal of the said Master and Fellows, and the other with the great seal of England. And the jury further found the act of 13th Eliz. c. 10, by which it is enacted by authority of parliament, that from thenceforth, all leases, gifts, grants, feoffments, conveyances or estates, to be made, had or suffered by any master and fellows of any college, dean and chapter of any cathedral or collegiate church, master or warden of any hospital, parson, vicar or any other, having any spiritual or ecclesiastical living, or any houses, lands, tithes, tenements or other hereditaments, being parcel of any such college, church, cathedral, hospital, rectory, vicarage or any other spiritual

living &c. to any person or persons, bodies politic or corporate, other than for the term of twenty-one years, or three lives, shall be utterly void and of none effect, to all intents, constructions and purposes &c. and they found likewise the act of confirmation of letters patent made 18th Eliz. c. 2, by which it is recited, that where, after the 18th day of November, in the 1st year of the reign of the said Queen Elizabeth, divers and several honors, castles, lands, tenements, rents, reversions, services and other hereditaments, were conveyed and assured to the said late queen, her heirs and successors, by divers and sundry persons and bodies politic, as well for the discharge and satisfaction of great debts and sums of money, as for other good considerations, for the perfect assurance, confirmation and further surety of which, it was enacted by authority of parliament, that all feoffments, fines, surrenders, assurances, conveyances and estates in any manner conveyed, had or made, or to be made at any time within seven years after the end of the session of the same parliament, "to or for our sovereign lady the queen's majesty, by or from any person or persons, bodies politic or corporate, of any honors, castles, manors, lands, tenements &c. for any debt, sum or sums of money, or other consideration whatever, shall stand, remain, and be good and available in law to all intents, constructions and purposes, according to the true meaning, intent and purport of the same, saving to all and every person and persons &c."

And further it was enacted, that all letters patent, indentures and other writings, sealed with the great seal of England, or the seal of the duchy of Lancaster (a), or the seal of the county palatine of Lancaster, then made and granted by the said queen for any sum of money, or for any other consideration, *essent bona, perfecta* and effectual in law &c. against the said queen, her heirs and successors, according to the tenor and effect of the same letters patent &c.

And they further found, that the said Queen Elizabeth, on the 29th January, in the said 17th year of her reign, by her letters patent under the great seal, granted unto the said *Benedict Spinola* (who was then a free denizen) the said messuage with the appurtenances, to have and to hold to him, his heirs and assigns for ever. Which *Benedict Spinola*, 15th June, anno 22 Eliz. by his deed indented and enrolled within six months in the Court of Chancery, did, for money, bargain and sell the said messuage with the appurtenances, to *Edward Earl of Oxford*, and his heirs. By force of which the said Earl entered, and was thereof seised in his demesne as of

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(a) See the Prince's Case, in Coke's Reports, part viii.

fee, *prout lex postulat*, and he being so seised, *Rowland Broughton*, gent. and *Elisabeth* his wife, *Crast. Trin. anno 24 Eliz.* levied a fine of the said house with the appurtenances, to the said Earl of Oxford and his heirs, with proclamations, which were found at large according to the statute, and afterwards, on the 9th May, anno 25 Eliz. the said Earl demised the said house to *Edward Hamond* for fifty-one years, who on the 9th November, anno 26 Eliz. assigned all his interest and term for years in the said house, to one *W. Marsham*, who on the 4th October, anno 2 Jac. died thereof possessed intestate; after whose death *Alice* his wife took administration of his goods &c. and on the 1st February, anno 4 of the then king (James I.) took to husband the said *Francis Castillion*, knight; and that the said *Roger Kelke*, Master of the said College, on the 8th January 1602 (which was anno 44 Regni Reginae Eliz.) died; and after his death *Barnaby Gooche*, Doctor of the Civil Law, was elected and made Master of the said College, and that the said *Edward Hamond*, in the name and stead of the said Earl, then tenant of the said house, paid to the said *Barnaby Gooche*, then Master of the said College, 15*l.* of the rent aforesaid, to the said Master and Fellows of the said College due at the feast of St. Michael, anno domini 1606; which 15*l.* the said *Barnaby Gooche*, then Master, received, and by writing under his hand, without a seal, acknowledged that he had received it; and that the said *Barnaby Gooche*, within five years after he was chosen Master, and after the receipt of the said rent, namely, on the 5th February, in the 4th year of the present king (James I.) into the said house, with the appurtenances, upon the possession of the said *Francis Castillion* and *Alice* his wife, did enter *in jure collegii sui præd'*, and the said Master and Fellows of the said College, on the aforesaid 5th February, by their indenture under their common seal, demised the said house, with the appurtenances, to the said *J. Smith* the defendant, for six years; and that the said *Francis Castillion*, knight, upon the possession of the said *John Smith*, re-entered and made the lease to the said *John Warren*, *prout* in the declaration, who was ejected by the said *J. Smith*, *prout* in the declaration: and the question which the jury referred to the court was, whether upon the whole matter, the entry of the said *J. Smith* was lawful or not &c.

And the four following points were moved and argued at the bar, namely;

1st. If the said conveyance made to Queen Elizabeth, by the Master and Fellows of the said College of the said house, parcel of the possessions of the said College, after the said act of Eliz. *Reginae*, was restrained by the said act?

2d. Admitting that the said conveyance was restrained by the said act of 13; if the said act of 18 Eliz. has supplied the defect thereof, and has made it perfect and effectual?

3d. Admitting also, that the act of 18 Eliz. doth not extend, nor give any force to it, if the said fine levied, and five years passed, shall bind the right of the Master and Fellows of the said College for ever?

4th. If the said acceptance of the rent aforesaid, by the said Master of the said College, should disable or conclude him from entering into the said house? And if any of the said points should be adjudged against the defendant, then his entry was not lawful, and by consequence judgment should be given for the plaintiff, *bonum defendentis ex integra causa, malum ex quolibet defectu*.

As to the *first* point it was objected, that by the rule of First point. the law, the king not being named in the act, is by the law exempted out of the act; for the law gives the king this prerogative, that for the dignity of his royal person, he is not by construction of the law included within these common words "person or persons, bodies politic or corporate;" and be the statute affirmative, or be it negative, which is stronger, it shall not bind the king unless he is specially named, but he shall take the benefit of a statute although he be not named?

In proof of this, many statutes and authorities are advanced, and arguments are adduced, which as they are only corroborative, are omitted in this place, but the student is referred to the Reports of Lord *Coke* for this legal information. The learned Reporter however concludes, that so in the case at bar, forasmuch as the queen was not named in the said act of 13 Eliz. she was not bound thereby, but was at liberty to take the said grant as she was before the said act of 13 Eliz.

It was likewise urged, that always after the act of 13 Eliz. divers masters and fellows of colleges, deans and chapters, masters or wardens of hospitals and others; having spiritual and ecclesiastical livings, had made many estates and leases to Queen Elizabeth, and to the king that then was (James I.) which are granted over and transferred to many persons, and all these were made by the advice of men well learned in the law, and of the counsel learned of the said queen, and of the king also; and the change of such a common and constant opinion, upon which the estates and interests of so many men depend, will be the occasion of great vexations, suits in law, and the ruin of many, who have not only spent their substance or the greatest part of it, upon such estates and leases, but have also spent much upon new buildings, and other charges upon them, all of which will be utterly lost by the change of the said continual practice; and in such changes (a), *rerum*

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(a) Co. Rep. part vi. fo. 40b. 1b. part xii. fo. 48. Co. 2d Inst. fo. 26. Hawks's Max. 311. 452.



*progressus ostendunt multa quæ initio præcaveri aut prævideri non possunt: and another saith, quod in ædificiis lapis male positus non est removendus; and the law saith (a), Interest reipublicæ ut sit finis litium.*

**Second point.** As to the *second* point it was argued by the plaintiff's counsel, that admitting the queen was bound by the said act of 18 Eliz. yet the said act of 18 Eliz has made the grant to the queen good and effectual. The learned counsel then proceeded with his argument, which is given at length by Lord Coke, but which is not necessary in this work.

**Third point.** As to the *third* point they argued, that the said Master and Fellows were a corporation aggregate of many, and had the entire fee in them, and cited many cases in corroboration of their argument.

**Fourth point.** As to the *fourth* point, forasmuch as the Master, who is the head of the corporation, had accepted the rent and given an acquittance under his hand, he had concluded himself from entering during the time that he was Master, and forasmuch as he was concluded, the Fellows, without their head, could not enter; and thereupon they concluded, that for all these four points, or for some of them, for if any of them should be adjudged for the plaintiff, judgment ought to be given for the defendant.

**For the defendant.** Against which it was argued by the defendant's Counsel, and they concluded that judgment should be given for the defendant. And as to the *first*, which was the principal point of the case, it was argued for the defendant, and unanimously resolved by the Judges, namely, Lord Chief Justice Coke, Sir John Croke, Sir John Doderidge, and Sir Robert Houghton, Justices, upon solemn argument in Court, that the said act of 18 Eliz. extends to restrain the Master and Fellows from conveying the said house to the Queen, although she was not named in the act. Because, 1. That the Queen, Lords spiritual and temporal, and the Commons, who made the said act, have adjudged, long leases made by colleges &c. to be unreasonable and against reason and *the law which is the perfection of reason, will never expound the words of the act against reason.* 2. That *the parliament had adjudged them to be causes of dilapidations.* 3. To be the decay of all spiritual livings. 4. The decay of hospitality. And, 5. The utter impoverishment of successors incumbents in the same; and much more to the same purpose, for which I refer the studious reader to Lord Coke's report of this important case. And therefore it

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(a) Co. Rep. part vi. fo. 45 a.

was unanimously resolved, that general statutes which provide necessary and profitable remedy for the maintenance of religion, the advancement of good learning and for the relief of the poor, shall be extended generally according to their words; and God forbid, exclaimed the learned sage, that by any construction, the Queen who made the act with the assent of the Lords and Commons, should be exempted out of this act of 13 Eliz. which provides necessary and profitable remedy for the maintenance of religion, the advancement of good literature, and the relief of the poor; and out of these colleges, deans and chapters &c. as well as the church, is furnished with grave and learned divines, for the instruction of Christians in the true religion, as the commonwealth with learned men, for the better administration of justice, as well temporal as ecclesiastical, which (*i. e.* religion and justice) are the main pillars which support the King's throne; and therefore of all others, the King, who is, as hath been said, is *persona mixta, medicus regni, pater patriæ, et sponsus regni*, who *per annulum* is wedded to the realm at his coronation, *should not be exempted out of this act by construction of law, which would be against reason, and the cause of dilapidations, the decay of spiritual livings, of hospitality, of the utter impoverishment of successors, and by consequence the decay of religion and justice would ensue.*

The Chief Justice *Coke* then cited many cases, some from his own Reports, tending to prove, that the Queen was bound though not named, and that although the true intent of the said exception in the act of the 1 Eliz. was for the support of the crown; yet by importunity of suitors, many estates and leases were made to the Queen by archbishops and bishops, with intent to grant them over to subjects for private uses; which the King, he said, that is now (James I.) perceiving of his religious care, that the possessions of the archbishops and bishops, should not be diminished, caused an act to be passed in the first session of the first year of his reign, cap. 3. to restrain such malpractices.

The *second* reason that this bright luminary of the law gave, that the King should not be exempted by construction of law, was, because the King is the fountain of justice and common right, and being God's lieutenant cannot do a wrong; and cited many cases in proof. It was resolved by him and the beforementioned other judges, *that the act being made to suppress wrong should bind the King.* The second point.

The *third* reason he assigned was, that the general words of a statute, which tend to perform the will of the founder or donor, should bind the King, although he be not named, and The third point.

cited the act of 17 Edw. 2. which bound the King, in Lord Berkeley's case.

The fourth point.

The *fourth* reason was, that the Master and Fellows were by the said act disabled to grant, and then if they be disabled to grant, the Queen could not take from them who are so disabled. And this disability is not *simpliciter*, *sed secundum quid*, for if the Master and Fellows make such a grant, it shall not be avoided by the Master himself, but by his successor, as it was resolved in this case, and had oftentimes been resolved before then.

The fifth point.

The *fifth* reason was, that in acts of parliament which are to be construed according to the intent and meaning of the makers of them, the original intent and meaning is to be observed. And it appeared, that the intent of the Master and Fellows was, that they would convey the said house to *Benedict Spinola* and his heirs; and because they could not do it *de directo*, they attempted to do it *ex obliquo*, to grant it to the Queen and her successors, but upon condition that the Queen should within three months grant it to the said *Benedict Spinola* and his heirs. So that it was endeavoured to make the Queen, who was the fountain of justice, the instrument of injury and wrong, and of a violation of a pious and excellent law, which she herself had made. And what was given to them for pious and charitable purposes, should be converted for the private use of the said *Spinola* and his heirs for ever. And the Poet, he said, well reprehended such conduct,

Fuit hæc sapientia quondam,  
Publica privatis secernere, sacra profanis.

And it was resolved, that the law will never make an interpretation to advance a private and to destroy the public, but always to advance the public, and to prevent every private, which is odious in law in such cases. And therefore it is well said in *Heydon's case*, in the third part of my (a) Reports, said his Lordship, that *the office of Judges is always to make such construction as to suppress the mischief, and advance the remedy.*

Much more valuable learning is displayed in this extraordinary case, for which I have not room nor indeed is it necessary, but it was resolved that as the said estate conveyed to Queen Elizabeth was of force during the life of Dr. *Kell*, then Master, and that he was alive at the time the fine was levied, and all the proclamations passed in his time, so that none could have made an entry or claim during his life; and

(a) Co. Rep. part iii. fo. 7 b.

that Dr. *Gooche* within five years after his death, did enter into the said house, claiming it to be the right of him and of the Fellows of the said College; for these causes also it was resolved, that this entry had avoided the fine. And according to these resolutions, which are given in full in Lord *Coke's* 11th part of his Reports, judgment was given, *quod quærens nihil caperit per villam*; or as the learned Serjeant Sir *Henry Rolle* has it in his report of the same case (a). Et judgment en le case al barre fuit donne *per totam Curiam* encontre le plaintiff, et pur le defendant solonque ceux resolutions avandit (b).

## No. X.

## SERJEANT DAVIES'S CASE (c).

Cestuy que ad le impropriation del' rectory ou parsonage doit repaire le chauncell, et auxi il doit contribute al reparations del' eglise, si a ascun terre in ceo ville, come in cest case le farmor et tenants de *Mr. Serjeant Davies* ust le impropriation, et auxi un farme in mesme le ville adjudge *per curiam* sans question.

Serjeant  
DAVIES'S  
Case, Rolle's  
Rep. part ii.  
p. 211.

## No. XI.

Prebendaries liable to dilapidation for houses, even if not annexed to the prebendal stall.

## DR. SANDS' CASE (d).

Dr. *Sands*, a residentiary prebendary of the church of Wells, brought an action in the Spiritual Court for dilapidations against the executors of Dr. *Pierce*, his predecessor; and they on the other side came and shewed, that in that church there are eight residentiary prebendaries to which, to encourage them to residence, there are eight houses belonging, that to each prebend there is a house belonging, but not any house in certain, the bishop having the privilege of appointing what house he thinks fit to each prebendary, but he must appoint one, they hence inferred that this house goes not in succession, nor is it part of the corps of a prebend, for that he is prebendary, and hath one house allotted him, and so was Dr. *Sands*; and afterwards, upon the death of another prebendary, another house. But Mr. Justice *Jones* answered, it is true

(a) Part i. fo. 172.

(b) Co. 11. 66 b. ad 79. *mesme*  
case.

(c) See the Treatise, page 34.

(d) Ibid. page 36.

here are eight houses belonging to eight residentiary *prebendaries*, whereof each prebendary *de jure* is to have one; *that no one house is ascertained to any particular prebend*, or is parcel of any particular prebend, but ought to be assigned to some particular prebend, and when the bishop doth so assign by virtue of his power, and not by virtue of any estate he had in him, then it is *part of the prebend*, and shall be *liable to a suit for dilapidations*; wherefore there ought to be no prohibition (*a*).

## No. XII.

BROWN *against* PALFREY.

Easter Term, 26 Charles 2d. in the King's Bench.

Custom to repair a chapel, and to be discharged from repair of the parish church (*b*).

BROWN  
v.  
PALFREY,  
Mich. 25. Rot.  
412.  
Lev. Rep.  
part ii. p. 102.

Prohibition to the Ecclesiastical Court of Durham, suggesting that they are a parochial chapel within another parish of Northumberland, and that the inhabitants of the chapelry have time out of mind had a parochial chapel and divine service, sacraments &c. and have used to be exempt from the repair of the parochial church, bells &c. in consideration of their being charged to the repair of their own chapel, and that they have usually repaired the same; and yet that the defendant, church-warden of the parish church, sued them to repair the said church, the parish bells &c. and the prohibition was granted. And at another day afterwards a consultation was moved for, for that this whole matter was pleaded there, and sentence given; and the case of *Chapel Brimage* (*c*) was cited, where in such a case a consultation was granted upon motion. To which it was answered, that in the case of *Chapel Brimage* sepulture was still reserved to the parish church, which was a reservation of the ancient right, which is not in this case. Also upon examination by the Court, the suggestion there was found false; and though it was decreed there against the plaintiff in the prohibition upon pleading the custom, yet it was to try a matter there, not within their jurisdiction, for they could not try customs; their law and ours differing as to the nature of customs (*d*), if a custom be alleged in the Ecclesiastical Court, and denied, a prohibition lies (*e*), a *modus* is suable there; but if denied a prohibition lies; the bounds of a

(*a*) Skin. 121, pl. 18. Trin.  
35 Car. 2. B. R. Dr. Sands' case.  
(*b*) See the Treatise, page 42.

(*c*) Hob. 66.  
(*d*) Latch, 48.  
(*e*) Ibid. 300.

parish are not triable there (*a*); a *modus* was sued for there, and another *modus* pleaded, and a prohibition granted. At last the Court ruled the prohibition should stand, which having before been granted absolutely, a consultation cannot be upon bare motion without plea. And *Hale* and the Court ruled the plaintiff should declare upon the prohibition, and the defendant should plead as he thought fit. Upon which he traversed the custom which was tried at Newcastle Assizes, and the jury finding no such custom, a consultation was granted. *Levinz*, counsel for the plaintiff in the prohibition. *Weston*, for the defendant (*b*).

## No. XIII.

*Wise against CREEKE.*

Hilary Term, 28 & 29 Charles 2d. in the King's Bench.

Repair of a parish chapel, sufficient to exempt from repair of a parish church (*c*).

A prohibition was prayed this Term to stay a suit in the Spiritual Court by the *Churchwardens of Adderbury in Com. Oxon.* against the inhabitants of *Bodecut*, a village within the parish of *Adderbury* for repair of the parish church; *suggesting*, that they have a chapel parochial and rights parochial, and *ratione inde* have time out of mind been discharged from repairing the parish church. The Court granted a prohibition, but ordered the plaintiff to declare thereupon, that the matter might come judicially in debate, whether such custom be good, or not? Accordingly the plaintiff declared, that time out of mind, they have had in *Bodecut* a chapel parochial or church of *Bodecut* infra parochiam de *Adderbury*; in which time out of mind there has been a body of a church, a chancel, campana & omnia alia parochialia trophæa, and divine service and sacraments, and a distinct perambulation for *Bodecut*, separate from that of *Adderbury*, and that the inhabitants of *Bodecut* never go to the church of *Adderbury*, nor have seats there, and that the inhabitants of *Bodecut* have distinct churchwardens, and make no other use of the church or church-yard of *Adderbury*, *nisi tantum* pro sepultura; and that time out of mind they have repaired their parochial chapel or church of *Bodecut*, and the inhabitants of *Adderbury* have been freed and exempt from this charge, and *ratione inde* time out of mind they have been freed and discharged

Wise  
v.  
CREEKE,  
Lev. part ii.  
p. 186.

(a) 3 Cro. 228, adjudged, and Hetl. 133, and 3 Bulst. 241.

(b) Vide Trin. 28 & 29 B. R. A pro-

hibition granted in a like case, and 2 Roll. Rep. 265.

(c) See the Treatise, page 42.

from repairing the church of *Adderbury*, and yet the defendants libel against them to repair the church of *Adderbury*. Upon this the defendant demurred, and for the plaintiff it was said, that a general prescription without cause to exempt from repairs of the parish church is not good, for every parishioner is liable thereto of common right. 2. The cause here; *scil.* the repair of their own parochial chapel is not a sufficient cause of discharge; for it is for their own ease and therefore cannot discharge them from a duty to which they are liable of common right. But if they had prescribed to be discharged upon paying so much towards the repair of the parish church or the walls of the church-yard, that might be good, as *2 Rolle*, 290. *Hob.* 166. Thirdly, this custom, if there be such a custom, might have been pleaded in the Spiritual Court, and there tried, being matter ecclesiastical, and triable there by the express words of the statute *de circumspecte agatis, scil. de ecclesiæ discoöperta vel cemeterio non clauso non jact prohibitio*: But for the defendant, it was answered; first, 'Tis true a general prescription to be discharged from the repair of the parish church is not good without some reasonable cause, no more than a general prescription of discharge from repair of the highway, *quia bonum publicum*. But 2. Here is a good cause of discharge for want of seats in the parochial church and not going there *nisi ad sepeliend*, and this might have a reasonable commencement. For instance the mother church might become too small for the people, and the people too numerous for the mother church by the increase of new buildings and inhabitants in the village; and it might be agreed, that the inhabitants of the village should build them a chapel, and no longer over-throng the mother church; but should repair and find seats, bells &c. in their own proper chapel; and this hath been allowed a good consideration of being exempt from the repair of the mother church, as in *2 Rolle*, 219. the same case before cited on the other side, and *Hob.* 67, where it appears the consultation in the case of *Chapel Bromich* was not granted because the custom was void, but because the suggestion was false; and *Hobart* himself in the end of the case says, if such a custom had been alleged, a prohibition had lain, and so it was resolved in this Court, *inter Palfry and Brown* (a). To the third objection 'tis true, the repair of churches is expressly within the statute *de circumspecte agatis*; but when a custom comes in dispute, the custom is temporal, and must be tried in the temporal courts, because their law and the common law differ in the very essence of customs. So tithes and a *modus decimandi* are within the words of the same statute; *scil. Decimis debetis, sive con-*

Custom though touching an ecclesiastical matter is triable in the temporal courts.

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(a) Pasch. 26 Car. 2. B. R.

*suetis*, where *Decimis* consuetis est modus decimandi (*a*); and for this reason a *modus decimandi* is suable there; but yet if the *modus* be denied or another *modus* there pleaded, a prohibition lies (*b*); and of this opinion was the Court; Mich. 29, when this case was argued upon the prohibition, *scil.* that a prohibition lay, and advised the defendant's counsel to take issue upon the custom; to which purpose they gave him time to talk with his client. *Holt*, junior, for the plaintiff; *Levinz*, for the defendant.

## No. XIV.

The Bishop of *Chichester*'s Commission, empowering two clergymen to visit every church, parsonage-house and other ecclesiastical edifices, within the archdeaconry of Lewes, in the county of Sussex, and to make their return to him or his vicar-general, of dilapidations, decays, want of repairs &c. (*c*).

From the registry of Chichester.  
Gibbs. Cod. Jur. Eccl. App. § 15, p. 1550.

## COMMISSIO PRO VISITATIONE PAROCHIALI.

*Johannes* permissione divinâ Cicestr.' Episcopus: Dilectis nobis in Christo A. B. & C. D. clericis, salutem, gratiam & benedictionem. Cùm (uti ex relatione fide dignâ acceperimus) quam plures ecclesiæ parochiales & capellæ infra decanatum de Lewes, ac domus mansionales, & alia ædificia prædict', ad easdem ecclesias & capellas spectan' & pertinen', valdè ruinosæ sint & dilapidatæ; nos, remedium in hac parte opportunum (prout ex officio nostro tenemur) providere cupien', ad visitand', personaliter omnes & singulas ecclesias parochiales, & loca ecclesiastica in & per totum decanatum de Lewes prædict', necnon cœmeteria, ac domus mansional', ac alia ædificia quæcunque ad hujusmodi ecclesias & capellas spectan' & pertinen', quibuscunque diebus citra festum sancti Andree prox' futur'; atque hujusmodi ecclesias & capellas, ac libros, ornamenta, cæteraque bona ac utensilia necessaria quæcunque, earundem ecclesiarum et cappellarum, domusque mansionales ac alia ædificia ecclesiastica prædict' itam intus quam extra, intuendi, inspiciendi & denotandi & ruinas, dilapidationes, decasus enormia seu defectus quoscunque in hujusmodi ecclesiis, capellis, ornamentis, cœmeteriis, domibus vel ædificiis invent' seu deprehen', reparatione, reformatione, vel renovatione indigen', fideliter denotandi & describendi. Vobis, de quorum fidelitate, sedulitate, ac in hujusmodi rebus gerendis dexteritate plurimum in hac parte confidimus, vices nostras, & vicarii

The bishop commissions two clergymen to visit every church, parsonage-house &c. within an archdeaconry,

(a) Co. 2 Inst. 490.

(b) 2 Roll. 293. Hetl. 138. 3 Bulst. 241.

(c) See the Treatise, page 20.



and to make  
their return  
to him or his  
vicar-general.

A. D. 1686.

nostri in spiritualibus generalis, conjunctim & divisim commit-  
timus, ac plenam tenore præsentium consedimus potestatem.  
Mandantes, & firmiter per præsentis injungen', omnibus &  
singulis guardianis sive œconomis & inquisitoribus quibuscunque  
infra decanatum prædict', ut vobis præfatis commissariis nostris,  
& cuilibet vestrum, in accessu vestro hujusmodi ad eorum re-  
spectivè ecclesias parochiales, seu capellas, sint diligenter  
attenden', obtemperan' & assisten', sub poena juris eis, si in  
hac parte negligentes aut contumaces fuerint, per nos aut  
vicarium nostrum in spiritualibus generalem infligendâ. De  
omnibus vero & singulis per vos in hac parte habitis, actis  
gestisque, ruinisque, dilapidationibus & defectis in ecclesiis  
sive capellis quâdam schedulâ per vos faciend', præsentibus  
annectend', dicto die vel citra, debite certificetis unâ cum  
præsentibus. Dat' sigileo nostro, decimo septimo die Decem-  
bris, Anno Domini 1686.

#### No. XV.

Gibs.Cod. Jur.  
Eccl. App.  
§ 7. p. 1497.

A Commission to view the defects of an episcopal palace (a).

*Commissio ad inspiciend' & taxand' defectus episcopatus,  
post episcopum defunctum.*

The Arch-  
bishop of Can-  
terbury being  
informed of  
dilapidations  
left by the  
Bishop of  
Lichfield and  
Coventry,

issues his com-  
mission to in-  
quire and re-  
port.

1374.

(b) *Walterus &c.* Dilectis nobis in Christo, Magistris *Rogero Mareschall, Wilhelmo de Leycestr.' & Roberto Patrila*, cano-  
nicis ecclesiæ Lichfeldensis, salutem &c. Quia in domibus, &  
maneriis, & locis, ad venerabilem fratrem nostrum, dominum  
R. Dei gratiâ Coventr.' & Lich.' episcopum pertinentibus,  
quampures & notabiles, ut accepimus, sunt defectus, qui  
tempore bonæ memoriæ Domini *Walteri*, nuper Coventr.' &  
Lich.' episcopi contigerunt, quorum reparatio ad dictum de-  
functum noscitur pertinere; vobis, de quorum fide & circum-  
spectionis industriâ fiduciam gerimus specialem, tenore præ-  
sentium committimus & mandamus, quatenus vos aut duo  
vestrum ad dicta maneria & loca sine moræ dispendio per-  
sonaliter declinantes, defectusque hujusmodi visui supponentes,  
ipsos per viros fide dignos & juratos, vocatis qui fuerint evo-  
candi, aestimari & taxari fideliter faciatis. Et quid in præmissis  
feceritis, nos opportuno tempore certificetis per literas vestras  
patentes, harem seriem, quales etiam fuerint hujusmodi de-  
fectus, & quanti, & ad quam summam aestimati, in cedulâ  
vestro certificatorio adjungend.' plenes continentes. Dat' &c.

(a) See the Treatise, page 46.

(b) Reynolds' Reg. fo. 132 b.

## No. XVI.

A Licence or Faculty for taking down and rebuilding  
an episcopal palace (a).*Licentia ad dimendum, & ædificandum, in palatio episcopi.*

Georgius &c. Reverendo in Christo Patri ac venerabili confratri nostro, Domino *Johanni* eâdem providentiâ Roffen.' episcopo moderno, salutem in domino sempiternam. Quia per inquisitionem venerabilis viri *Walteri Balcanqual*, sacræ theologiæ professoris, decani ecclesiæ cathedralis Christi & Beatæ Mariæ Virginis Roffen.' *Georgii Smith, Christopheri Dale, Edmundi Jackson & Joannis Lorkin*, præbendariorum ejusdem ecclesiæ cathedralis (quæ inquisitio facta est virtute commissionis nostræ ad eos directæ, gerentis dat.' vicesimo octavo die mensis Maii ultimò præterit.) & per eorum certificatorium (cui annexu est commissio nostra antedicta ac nobis transmissa) sub manibus eorum propriis & sigillis respectivè nobis significata erat sub formâ sequente, *The certificate of Walter Balcanqual, Doctor of Divinity &c.* Per quod nobis apparet, quædam ædificia ad palatium sive domum vestram episcopalem apud civitatem Roffen.' valde ruinosa esse, quæ reædificanda sunt, ac in meliorem formam redigenda et reparanda. Alia verò planè sine usu et omnino superflua existere, et potiùs diruenda esse quam reparanda et reædificanda. Nos igitur, judicium dictorum commissariorum sequentes, licentiam, facultatem pariter et auctoritatem tibi (quantum in nobis est, et jura hujus regni Angliæ in ea parte patiuntur, et non aliter neque alio modo) damus, concedimus et confirmamus, ut eas partes ædificiorum in prædicto certificatorio contentas et specificatas, quas dicti commissarii nostri in dicto certificatorio, tanquam sine usu et omnino superfluas, diruendas et penitùs demoliendas et amovendas esse certificant, diruere, demolire et penitùs amovere (modò tamen materies, quæ ex ruinis et demolitionibus hujusmodi superfuerint ad reparationem reliquarum domorum et ædificiorum palatii vestri episcopalis Roffen.' antedicti, et non ad alios usus, applicenter) liberè, licitè et impunè, valeas et possis; aliquâ ordinatione, canone vel constitutione ecclesiasticis, in contrarium faciend.' non obstante. Alias vero partes ædificiorum prædictorum, quas dicti commissarii nostri in dicto certificatorio reformandas, reparandas reædificandas, sustinendas et sustentandas esse certificant, reformare, reparare, reædificare, sustinere et sustentare, secundùm ordinationes, canones et constitutiones ecclesiasticas, teneberis. In cujus rei testimonium sigillum (quo in hac parte utimur) præsentibus apponi fecimus. Dat' decimo septimo die menses Julii, Anno Domini 1632, et nostræ translationis anno vicesimo secundo.

The episcopal palace of Rochester ordered to be rebuilt, 1632. Abbot 3 Reg. fo. 128 b. Gibs. Cod. Jur. Eccl. App. § 7. p. 1498. A commission having been issued to view an episcopal palace,

and a return made by the commissioners how it may be ordered for the best,

a licence or faculty is accordingly granted.

A. D. 1632.

(a) See the Treatise, page 46.

No. XVII.

1 Arund.  
fo. 386 a.  
Giba. God. Jur.  
Eccl. App.  
§ 7. fo. 1499.

A return to an inquisition, which recites the commission, and sets forth the duties of incumbents to employ all money received for dilapidations within twelve months (a).

The return recites the archbishop's commission,

setting forth the obligation upon incumbents to employ all monies received for dilapidations within a year; and in other cases, to repair within two months after notice, upon pain of sequestration notwithstanding which, several incumbents neglected to repair,

and therefore he requires them to be admonished to do it upon pain of sequestration.

Reverendissimo in Christo Patri ac Domino, Domino *Thoma*, Dei Gratia Cant' archiepiscopo, totius Angliæ primati et apostolicæ sedis legato, vester humilis et devotus obedientiæ filius *Adamus Body*, consistorii vestri Cantuar.' registrarius obedientiam, et reverentiam tanto patri debit.' cum honore. Mandatum vestrum reverendissimum 26 die mensis Novemb. A. D. 1403 recepi, tenorem continens subsequentem. *Thomas*, permissione divinâ . . . . Cant' &c. Dilectis in Christo filiis, Magistro *Rogero Basset* commissario nostro Cantuar.' generali, *Ade Body* registrario et *Thoma Wilton* apparatori nostro generali salutem &c. Sartatecta à perceptoribus fructuum reparari, non solum juris civilis et canonice dictat auctoritas, set et sacri eloquii pagina instruit, ac constitutiones nostræ provinciales penali quadam adjectione disponunt, censurâ (viz.) tali adhibitâ, ul quæcunque pecuniar.' summæ nomine reparationis, per viam compositionis receptæ, sive judicii, in ipsam reparationem infra certum tempus arbitrio convertantur. Defectus quoque notabiles in mansis beneficiator.' sive cancellis ecclesiar.' repert.' si infra duos menses à tempore monitionis ipsius ordinarii non fuerint congrue reparati, idem ordinarius tantum recipi faciat de fructibus ipsius beneficii, unde eosdem defectus faciat debite reparari: nonnulli tamen rectores et vicarii nostræ Cant.' diœces.' rectorias et vicarias suas in cancellis, domibus et clausuris, ad eorum reparationem seu refectionem pertinentibus intactis patiuntur deformari ruinis, ut ea occasione protholor.' divina officia alicui non implentur, subtrahitur hospitalitas, mortuo incumbente brige et discordiæ suscitantur, ac nostra negligentia clamoris insinuationibus irretitur. Ne igitur tanta provisio cum subjectis periculis nostris conniventibus oculis pereat sine fructu, vobis conjunctim et divisim committimus, et firmiter injungendo mandamus, quatenus omnes et singulos rectores et vicarios, per nostram diœces.' ubilibet constitutos, nostra autoritate moneatis et efficaciter inducat, quos etiam nos tenore præsentium sic monemus, ut omnes et singulas pecuniarum summas, nomine beneficiorum suorum hujusmodi, per viam compositi sive judicii per eosdem receptas, in reparation' et refection' eorundem beneficior' indilate convertant; quòdque cancellos, domos, grangias et clausuras, ad eadem beneficia et ipsorum beneficiorum reparationem seu refectionem pertinentes, infra duos menses à tempore monitionis

(a) See the Treatise, page 46.

hujusmodi eisdem in hac parte factæ, seu notificatæ, congrue faciant reparari, seu defectus refici eorundem: denunciatis insuper per expressum, quòd si quis vel qui, quovis quesito colore, mandata nostra hujusmodi temerè neglexerit adimplere, nos eorundem defectus et negligentias, secundum omnem vim, formam et effectum constitut' nostrarum provincial' de quarum tenore superius fit mentio, supplere curabimus in eventum. Et quid fecerites in præmissis, nos, lapso termino hujusmodi monitionis, distinctè et clarè curetis reddere certiores.

Dat' in manerio nostro de Maidston, 16<sup>o</sup> die mensis Novembris, Anno Domini 1403, et nostræ translationis anno octavo. Cujus autoritate mandati vestri reverendissimi, omnes et singulos ecclesiarum subscriptarum rectores (viz.) de Crundale, Bishopsbourn, Kyngeston, Charring, Hawkeherst, Sandeherst, Bocton, Malherbe, veteri Romney, Hope, Demechurche, Estbrugge, Snave, Snergate, Orgareswyke, Lymynge, Saltwode, Blakemanston, Sutton Valence, et Elmele, ac perpetuam vicarium, de Lyde vestræ diocesis sive eorum procuratores, monui et moneri feci, juxta omnem vim formam, et effectum dicti mandati vestri reverendissimi, prout natura et qualitas ejusdem etiam in se exigunt et requirunt. Et sic mandatum vestrum reverendissimum, quantum in me est, obedienter sum executus. In cujus rei testimonium sigillum commissarii vestri Cant' generalis præsentibus apponi procurari.

The names of the incumbents who were admonished.

Dat' Cant' 26 die mensis Januarii, Anno Domini supra dicto. A.D. 1403.

## No. XVIII.

Dilapidations being left by an incumbent's predecessor, a commission is issued by the Archbishop of *Canterbury*, to inquire into the same (a). Islip. fo. 10 b. Gibs. Cod. Jur. Eccl. App. § 7. fo. 1499.

*Commissio ad inspiciend' & taxand' defectus rectoriæ, tempore prædecessoris.*

(b) *Simon &c.* Decano de Pageham, nostræ jurisdictionis immediatæ, salutem, gratiam & benedictionem: Intimavit nobis dominus *Johannes Aite Prestes* rector ecclesiæ de Tangmere, nostræ jurisdictionis prædictæ, quod in domibus, cancello, libris & ornamentis ecclesiæ suæ, nonnulli sunt defectus notabiles & enormes; quorum reparatio ad dominum *Thomam de Goldyng-ham*, nuper rectorem ipsius ecclesiæ dum vixit, & nunc ad executores suos, ut asserit, dinoscitur pertinere; sibi quæ in hac parte petit per nos provideri de remedio opportuno. No-

Complaint being made of dilapidations left by the predecessor

(a) See the Treatise, page 46.

(b) Islip. fo. 10 b.

A commission  
issues to in-  
quire and re-  
port.

A. D. 1349.

lentes igitur eidem in suâ deesse justitiâ, sicuti nec debemus, tibi committimus & mandamus, quatenus vocatis vocandis, ad quem seu quos defectuum hujusmodi reparatio pertineat, & ad quam summam se extendat, & quorum, seu cujus rectoris temporibus contigerunt, per viros fidedignos & juratos diligenter inquiras. Et quid per hujusmodi inquisitionem inveneris, statim (dicto negotio expedito) nos cures reddere certiores per literas tuas patentes & clausas, harum seriem continentes. Dat' apud Lambeth, XIII Kalend' Februarij, Anno Domini Millesimo CCC<sup>mo</sup> XLIX<sup>o</sup> & consecrationis nostræ primo.

### No. XIX.

1 Arundel,  
fo. 145 a.  
Gibb. Cod.  
Jur. Eccl.  
App. § 7.  
fo. 1500.

Commission from the Archbishop of *Canterbury*, reciting, that a Canon of Wells had complained of dilapidations left by a predecessor (a).

*Commissio in causâ appellationis, occasione dilapidationem firmæ ad ecclesiam spectantis.*

The arch-  
bishop's com-  
mission re-  
cites, that a  
Canon of Wells  
had complain-  
ed of dilapida-  
tions left by  
his predecess-  
ors in a cer-  
tain farm,

*Thomas &c.* Delectis in Christo filiis, dominis *Willielmo Calfe*, succentori et *Thomæ Maydyngleghe*, canonicis ecclesiæ cathedralis Wellen' et *Thomæ Lyghe*, rectori ecclesiæ parochialis de Obelygh, Bathon' et Wellen' Dioces' salutem, gratiam et benedictionem suam. Nobis dilectus filius venerabilis vir Magister *Rogerus Harwell*, canonicus residentiarius dictæ ecclesiæ cathedralis Wellen' firman in eadem ecclesia de Modford et Lonynton, per mortem *Thomæ Byngham*, dum vixerit, et tempore suæ mortis canonici dictæ ecclesiæ, et firmarii firmæ antedictæ nuper in facta decedentis vacantem, juxta statuta et consuetudines ejusdem ecclesiæ, ut asseritur, debite obtinens, gravem querelam monstravit, quod præfatus *Thomas Byngham* dicti querellantis in firma supradicta prædecessor' immediatus, quamplures et diversos defectus graves, et enormes, notabiles et patentes, refectionem, emendationem et reparationem necessariis notorie indigentes, in domibus, muris et clausuris, rebusque aliis dictæ firmæ tempore ipsius *Thomæ* dum vixit, et firmarius hujusmodi extitit, ac ejusdem morâ, culpâ et negligentia contingentes, suæ mortis tempore reliquit irreparatos, incorrectos penitus et suppletos; qui quidem defectus adhuc notorie remanent incorrecti et insuppleti, quorumque refectionis, reparationis, et suppletionis onus, ad dictum *Thomam Byngham* dum superstes erat, ac tempore quo ab hac luce migravit, ac citra ejus mortem ad suos executores, aut bonorum administratores et occupatores dinoscitur notorie pertinere; et quamquam bona sufficientia ipsius defuncti, ad hujusmodi defectus omnes

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(a) See the Treatise, page 36.

et singulos debite reficiendos, ad manus ipsorum executorum notorie pervenerunt, et remanent in præsentì, iidem tamen executores ipsos defectus debitè reficere, ad hoc per partem dicti querelantis sæpius et congruè requisiti, non curaverunt, set hoc facere absque causa rationabili seu legitima quacunque expressè recusârunt et recusant, seu plus debito distulerunt et deferunt injustè, in ipsius querelantis præjudicium et gravamen; super quibus pars ejusdem querelantis petiit instantèr à nobis de congruo sibi remedio provideri: Nos igitur, qui jure legationis nostræ et prærogativæ ecclesiæ nostræ Cantuarien', obtentu, universas causas singulorum subditorum suffrageonorum nostrorum, quæ per appellationem vel querelam ad nostram audientiam perveneunt, audire possumus et debemus, sicut qui in nostra provincia Cantuar'. Vices domini nostri Papæ gerere comprobamur, nolentes eidem parti querelanti in sua de esse justitiâ, sicuti nec debemus, ad inquirend' in forma juris, vocatis primitus ad hoc legitime coram vobis dicti *Thomæ Byng-ham* executoribus, sive bonorum administratoribus et occupatoribus, ac aliis de jure vocandis, si præmissa veritate nitantur, necnon de et super defectibus antedictis, qui et quales fuerunt atque sunt, ac pro quanto valeant compinenter refici, reparari et debite suppleri, hujusmodique inquisitionis et reparationis negotium, cum suis emergentibus, incidentibus et connexis universis audiendis, discuciendis et fine debito terminandis, et in casu quo præmissa inveneritis veritate fulciri, dictis executoribus ad congruas et debitas reparationem et refectionem defectuum prædictorum, seu aliàs de et pro eisdem præfato *Rogero Harwell* canonico et firmario antedicto satisfaciend', canonicè compellend'; vobis conjunctim et cuilibet vestrum divisim, de quorum fidelitate et industria plene confidimus, committimus vices nostras, cum cujuslibet coherctionis canonice, et ea quæ decreveritis debite executioni demandand' potestate; mandantes quatenus dicto expedito negotio, de omni eo quod feceritis et coram vobis factum fuerit, et inveneritis in præmissis, nos, aut nostr' antedict' causarum et negotiorum auditorem, clarè et distinctè certificetis per literas vestras patentes, harum seriem continentes, sigillo authentico consignat', vel sic certificet ille vestrum qui præsens nostrum fuerit executus.

Dat' in manerio nostro de Lambeth, 27<sup>o</sup> die mensis Octobris, A. D. 1406, nostræque consecrationis anno undecimo.

and that the executors had in their hands sufficient assets to make reparation, but refused:

whereupon the archbishop grants a commission to inquire and to compel reparation, if the facts were proved.

A. D. 1406.

## No. XX.

Courtney Re-  
gistr. fo. 51 b.  
Giba. Cod.  
Jur. Eccl.  
App. § 7.  
fo. 1501.

Commission to sequester the goods of a deceased rector,  
who had left dilapidations (a).

*Commissio pro sequestrando bona rectoris defuncti,  
quousque satisfactum fuerit de defectibus.*

The rector of  
Rohnenden  
having left  
dilapidations,

which rest  
upon his exe-  
cutors or ad-  
ministrators ;

all his goods  
are put under  
sequestration.

*Willielmus* permissione divinâ Cantuarensis archiepiscopus, totius Angliæ primas et apostolicæ sedis legatis &c. delectis filiis &c. Quia intelleximus quoddam Dominus *Richardus Crissenyle*, nuper rector ecclesiæ de Rohnenden, plures defectus notabiles tam in cancello, libris et ornamentis, quàm in domibus et clausuris ac aliis ædificiis ipsius rectoriæ, negligenter dimisit incorrectos, quorum reparatio ad ipsum dominum *Ricardum* rectorem prædictum, dum vixit, pertinuit et ad ipsius executores et bonorum suorum administratores si quos dimiserit, notoriè pertinet in præsentem ; ac insuper non modicam dilapidationem in prostrationibus arborum, sepium et boscorum, ad dictam ecclesiam pertinentium, fecit, et ultra quàm necesse fuit dissipando consumpsit, in dictæ ecclesiæ læsionem manifestam, ac successoris sui rectoris dampnum non modicum et gravamen : Quocirca, vobis conjunctim et divisim committimus et mandamus, quatenus omnia res et bona ubicunque fuerint inventa, in quorumcunque manibus existentia, auctoritate nostrâ sequestretis, et sub arcto et tuto custodiatis sequestro ; quousque executores prædicti, si qui fuerint, seu aliàs bonorum hujusmodi administratores, pro reparatione dictorum defectuum idoneam coram nobis præstiterint cautionem, seu aliàs vero ipsius ecclesiæ rectori pro defectibus ipsis et dilapidatione congruè fuerit satisfactum.

A. D. 1382.

Dat' apud Maghfeld, primo die Januarii &c.

## No. XXI.

Pacher ; Re-  
gistr. fo. 387 a.  
Giba. Cod.  
Jur. Eccl.  
App. § 7.  
fo. 1501.

Sequestration of the profits of a living, for dilapidations in the chancel and houses of a rectory, the rector then living, and providing for the cure of the same (b).

*Sequestratio fructuum rectoria, pro defectibus re-  
parandis, rectore vivente.*

The chancel  
and houses of  
a rectory, be-  
ing greatly di-  
lapidated, by  
the neglect of  
a rector then  
living,

*Matthæus*, permissione divinâ Cantuariensis archiepiscopus, totius Angliæ primas et metropolitanus, dilectis nobis in Christo *Georgio Goringe*, parochiæ de Ovingdeane in comitatu Sussex

(a) See the Treatise, page 47.

(b) See the Treatise, page 47

armigero, & *Johanni Shelly*, armigero parochiæ de Patcham in dicto comitatu Sussex &c. salutem, gratiam et benedictionem. Cum (uti ex fide dignâ relatione accepimus) cancellus ecclesiæ parochialis de Stanmer in decanatu de Southmalling, nostræ et ecclesiæ nostræ Christi Cantuarensis jurisdictionis immediatæ, necnon rectoria et alia ædificia eidem pertinentia, negligentia et incuriâ *Thomæ Kynge*, clerici, rectoris ecclesiæ parochialis de Stanmer prædict' ejusque firmariorum sive deputatorum, admodum ruinosæ et ferè funditus prostrata existunt; quòdque præfatus *Thomæ Kynge* nonnullus decimas, fructus, redditus et proventus ipsius ecclesiæ diversis separalibus personis locaverit, et ad firmam dimiserit; cujus prætextu hujusmodi firmarii circa eorundem fructuum et decimarum perceptionem ad vim et arma verisimiliter convoluturi sunt, nisi de celeri et congruo remedio in hac parte provideatur: Nos igitur, præmissa con-

niventibus oculis præterire nolentes, sed eis pro posse nostro subvenire cupientes, ac ut fructus, redditus et emolumenta dictæ ecclesiæ, quæ (deductis oneribus consuetis eidem ecclesiæ incumben-  
tibus) remanserint, ad reparationem præmissorum, et ad usus jus et interesse in eisdem habentis, conserventur, providere volentes; omnes et singulos fructus, redditus, proventus, decimas, oblationes ac alia jura et emolumenta ecclesiastica quæcunque ad dictam ecclesiam parochialem spectantia et pertinentia, ex causis prædictis, et aliis nos in hac parte specialiter moventibus, ex officio nostro duximus sequestranda, prout etiam sic sequestramus; et hujusmodi sequestri nostri custodiam vobis conjunctim et divisim committimus per præsentis. Ad publicandum igitur hujusmodi sequestrum nostrum, sic per nos interpositum, omnibus et singulis quibus interest in hac parte; necnon ad colligendum, levandum et percipiendum omnes et singulos fructus, decimas, obventiones, commoditates et emolumenta ecclesiastica quæcunque ad dictam ecclesiam parochialem quoquo modo spectantia et pertinentia, easque et ea sic collecta, levata et percepta, sub salvo et tuto sequestro custodiendum et conservandum, et quæ temporis morâ de verisimili futura sunt deteriora, justo pretio alienandum et venditioni exponendum. Ac de collectis levatis et perceptis, hujusmodi curæ dictæ ecclesiæ parochialis in divinis officiis et aliis requisitis deserviri, ac defectus et decasus cancelli et aliorum ædificiorum prædictorum sufficientia reparari et emendari faciendum, necnon omnia alia onera eidem ecclesiæ incumbentia, supportari faciendum et causandum, ac de residuo sic collect' levat' et percept' fidelem computum sive ratiocinium (cùm ad hoc congruè fueritis requisiti) justè reddendum et faciendum; cæteraque omnia et singula alia faciendum, gerendum et expediendum, quæ in hac parte necessaria fuerint seu de jure quomodolibet requisita; vobis vices et auctoritatem nostras conjunctim et divisim committimus per præsentis; tantis per duratur' quoad eas duxerimus relaxand'. Et præterea, universis et singulis clericis et literatis quibuscunque per provinciam nostram Can-

a sequestration of profits is issued,

and (the cure being first provided for) reparation is enjoined,

with usual denunciation of spiritual censures against all who shall hinder.



tuariensem ubilibet constitutis, præsentes literas nostras recepturis, conjunctim et divisim committimus, et firmiter injungendo mandamus, quatenus, si quis præsenti sequestro nostro contradixerit, aut eidem contravenire voluerit, vel hujusmodi nostrum sequestrum ausu temerario, quovis quæsito colore violare præsumpserit; tunc citent seu citari faciant peremptoriè contradictores et violatores hujusmodi omnes et singulos, et quemlibet eorum, quòd compareant et quilibet eorum compareat coram nobis aut vicario nostro in spiritualibus generali aut officiali principali quocunque, in ecclesià cathedrali divi Pauli, London' loco consistoriali ibidem, decimo quinto die post citationem hujusmodi eis aut eorum alicui in hac parte respectivè factam, si juridicus fuerit, alioquin proximo die juridico ex tunc sequente, quo nos, aut officialem principalem hujusmodi, ad jura reddend' harum causarum ibidem consuetum, pro tribunali sedere contigerit; certis articulis, capitulis sive interrogatoriis, prænmissa ac contemptum et vilipendium nostri et jurisdictionis nostræ ecclesiasticæ concernend' eis et eorum cuilibet, cum venerint, ex officio nostro respective objiciend' et ministrand' personaliter responsuri, ulteriusque, facturi et recepturi quod justum fuerit in hac parte. Et quid in præmissis feceritis, nos aut vicarium nostrum in spiritualibus generalem sive officialem principalem hujusmodi, dictis die, horâ et loco, vel citrà, debitè certificetis, seu certificet ille vestrum qui præsens nostrum mandatum fuerit executus.

A. D. 1568.

Dat' quinto die mensis Julii, Anno Domini 1568, et nostræ consecrationis anno nono.

## No. XXII.

Peccham;  
Reg. fo. 56 b.  
Gibs. Cod.  
Jur. Eccl.  
App. § 7.  
fo. 1502.

A sequestration having been relaxed by the archbishop, upon caution being given to repair, inquiry is directed whether any such repairs have been done, and if not, sequestration is to be made again (a).

*Commissio ad inquirendum, an reparationes factæ fuerint secundum cautionis datas; et si aliter, ad sequestrandum.*

Frater (b) g. &c. officiali suo Cant' salutem &c.

A sequestration having been relaxed, upon caution given to repair.

Meminimus, nos nuper fructus ecclesiæ de Bisoppesburnæ, pro quibusdam defectibus tam in domorum ædificiis quàm ornamentis ecclesiæ repertis sequestrari fecisse: Demùm autem, Procurator Ottonis Computi defuncti, quondam rectoris ejusdem ecclesiæ, coram nobis comparens, ipsum sequestrum tali condicione optinuit relaxari, ut videlicet prius de reparandis

(a) See the Treatise, p. 47.

(b) Johannes Peccham, Registr. fo. 56 b.

omnibus defectibus tam in ædificiis, quàm in ornamentis ecclesiæ fidejussorias exponeret cautiones; super quibus quid hucusque factum extiterit, penitus ignoramus. Quocirca discretioni vestras committimus & mandamus, firmiter injungentes, quatenus de permissis inquirentes diligentius veritatem, si dictas cautiones sufficienter esse præstitas inveneritis, fidejussores ipsos auctoritate nostrâ per censuram ecclesiasticum compellatis ad integram reparationem, & refectionem omnium defectuum prædictorum: Si verò super hiis nihil inveneritis esse factum, fructus ipsius ecclesiæ, & quæcunque alia bona dicti defuncti, sequestratis, & sub sequestro faciatis arctius detineri. Mandantes districtè firmario ecclesiæ memoratæ, & sicut nobis de ipso sequestro respondere volueritis, inhibentes, nè quicquam de bonis ipsius defuncti penes eum residentibus, ejus executoribus vel aliis quibuscunque restituat, donec prædicti omnes defectus integrè reparentur, & super hoc à nobis aliud receperit in mandatis. Quid autem super hiis inveneritis, nobis, quam citius fieri poterit, fideliter intimetis. Denunciantes insuper ipsi firmario, quòd si ipsa bona à suis manibus permiserit elongari, nos ea de ipso usque ad quadrantem ultimum requiramus.

Inquiry is directed, whether any thing hath been done? And if not, sequestration to be made again.

Dat' apud Wytten, 2 non. Junii, consecrationis nostræ anno secundo. A. D. 1280.

## No. XXIII.

A rector having petitioned to make sundry alterations in his parsonage-house, the archbishop issues a commission to inspect the same and make a return (a).

Sancroft; Reg. fo. 219 a. Gibs. God. Jur. Eccl. App. § 7. fo. 150 f.

*Commissio ad inspiciendum domos rectoriæ, pro mutatione earum statûs; ad petitionem rectoris.*

*Willielmus (b)*, providentiâ Divinâ Cantuariensis Archiepiscopus, totius Angliæ primas & metropolitanus, dilectis nobis in Christo *Thomæ Grenhalh*, rectori de Cooling, *Richardo Pearson*, vicario de Higham, *Johanni Crew*, vicario de Hartlipe, *Edwardo Turner*, rectori de Halstow, in comitatu Cant', *Johanni Guy*, de Strood; *Isaaco Blake*, de Strood prædict', *Henrico Gardner*, de Hawling, *Bonham Haze*, de Cobham, in comitatu Cantii, respectivè, generosis; necnon capitaneo *Roberti Barker*, de Ifield aliàs Singlewell, in comitatu prædicto, armigero, salutem & gratiam. Porrecta nobis nuper petitio ex parte *Georgii Stradling*, sacre theologiæ professoris, rectoris rectoriæ ecclesiæ parochialis de Cliffe in comitatu Cantii prædicto, ecclesiæ cathedralis & metropolitice Christi Cantuariensis peculiaris & exemptæ jurisdictionis, continebat, quòd nonnulla ædificia, domus, & structuræ, vulgò vocat' the old kitchin, the old well-

Upon the petition of a rector, to make alterations in his parsonage-house,

(a) See the Treatise, page 47.

(b) Sancroft, Registr. fo. 219 a.

a commission  
in order to  
inspect, and  
make return.

A. D. 1679.

house, and the vicaridge-house, ex antiquo fabricat' et constructi ad dictam rectoriam de Cliffe, predicti, spectant' & pertinent in ruinas dilapidata, & quasi per plurimos annos elapsedos devastata fuerunt, & sunt, ut ratione decussum, dilapidatissimum, & ruinarum predict' potius destruenda & demolienda sint quam de novo reperanda & resuscitanda; quorum demolitiones & destructiones potius ad commodum & utilitatem, quam dispendium & prejudicium dicti rectoris moderni & successorum suorum merito cedere censeantur: Nobis igitur supplicaverit, quatenus ruinas & dilapidata edificia & structuras predict' ad dictam rectoriam de Cliffe spectant' dirui & demoliri, ac materiam, que ex ruinis & demolitionibus eorundem superfuerit, ad congruam reconstructionem & reparationem reliquarum domorum & edificiorum ad dictam rectoriam destinari & applicari dignaremur decessere: Vobis igitur, de quorum fidelitate & circumspectis industriis plurimum in hac parte confidemus, tenore presentium committimus & mandamus, quatenus vos, aut quatuor vestrorum, ad dicta edificia, domos et structuras predict' ad dictam rectoriam de Cliffe spectant' sine morae dispendio personaliter advenientes, decasus & ruinas dictorum edificiorum visu superintendatis vestro, ac omnia & singula edificia ibidem, que magis ex usu & utilitate dicti rectoris & successorum suorum, mature & deliberato consilio & iudicio vestro, aut quatuor vestrorum, diruenda & amovenda sint quam reparanda, nobis, aut vobis, aut quatuor vestrorum, in scriptis sub sigillis vestris, aut quatuor vestrorum, particulariter tempore opportuno, verumque presentibus certificetis. In cujus rei testimonium, sigillum (quo in hac parti utimur) presentibus apponi fecimus. Dat' vicesimo nono die mensis Aprilis, Anno Domini millesimo sexcentesimo septuagesimo nono, nostræque consecrationis anno secundo.

# No. XXIV.

Sancti:  
Reg. fo. 214 b.  
Siba. Cod.  
Jur. Eccl.  
100. 17.  
fo. 1013.

An inquisition and return having been made concerning the proposed alterations to the said parsonage-house, by which its state and condition was reported, a licence was granted by the archbishop to demolish and rebuild, according to the tenor of the said return (a).

*Licentia ad mutandam statum domus rectorie, secundum tenorem certificationis superinde facti.*

After inquisition, and return, concerning a parsonage-house,

Wilhelmus (b), Providentiâ Divinâ Cantuariensis Archiepiscopus, totius Angliæ primas & metropolitanus, dilecto nobis in Christo reverendo viro *Georgio Stradling* sacre theologie professori, rectori ecclesiæ parochialis de Cliffe in comitatu Cantii, ecclesiæ nostræ cathedralis & metropolitice Christi

(a) See the Treatise, page 47.

(b) Sancti, Registr. fo. 214 b.

Cantuariensis peculiaris jurisdictionis & immediatæ, salutem & gratiam. Quia per inquisitionem *Richardi Pearson* vicarii de Higham, *Johannis Crew* vicarii de Hartlipp, *Edwardi Turner* rectoris de Halstoe, necnon *Isaaci Blake* de Stroode, respectivè, in comitatu Cantii prædicto (quæ inquisitio facta est virtute commissionis nostræ, ad eos & alios directæ) & per eorum certficatorium sub manibus eorum propriis & sigillis respectivè, nobis significatum erat, sub hac forma :

*We whose names are underwritten, by virtue of a commission directed to us from the most Reverend Father in God William, by Divine Providence Archbishop of Canterbury, to make inspection into the ruins and dilapidations of the parsonage-house of Cliffe, and other buildings thereunto belonging, Do certify, That, in our judgments, the house called the Vicaridge-house may be demolished, as altogether useless: Likewise, that the Old Kitchen, and Old Well-house may be taken down; provided the hall now standing be made into two lower rooms and chambers.*

*And as for the Fodder-house, it is our opinion, that it should rather be repaired than demolished. In witness hereof we have hereunto set our hands and seals, May the 7th, 1679. Ri. Pearson vic. de Higham. John Crew vic. de Hartlipp. Edw. Turner rec. de Halstoe. Isaac Blake.*

Per quod nobis apparet, quoddam ædificium vulgò vocatum *The Fodder-house*, ad domum mansionalem rectoriæ de Cliffe prædict' spectan' & pertinen' valdè ruinosum esse; quod re-ædificandum est, & in meliorem formam redigendum & reparandum; alia vero ædificia vulgò vocata *The Vicaridge-house, the Old Kitchen, and Old Well-house*, potiùs diruenda, quàm reparanda & re-ædificanda; sub eâ conditione & provisione, ut aula dictæ domûs mansionalis ad dictam rectoriam spectan' (Anglicè *The Hall*) in quatuor partes Anglicè *rooms* (scilicet duas camerus, Anglicè *two upper rooms* or chambers, & duo spacia inferiora, Anglicè *two lower rooms*) ædificetur & convertatur. Nos igitur judicium dictorum commissariorum sequentes, licentiam, facultatem, pariter & auctoritatem, tibi (quantum in nobis est, & jura regni in eâ parte patiunter, & non aliter nequ alio modo) damus, concedimus, & confirmamus, ut eas partes domûs & ædificiorum, & ædificium vulgo vocatum *The Vicaridge-house*, in prædicto certficatorio respectivè contentis & specificata, quæ dictâ commissarii nostri diruenda & demolenda esse certificant, diruere demolire, & penitus auferre (modò tamen materies quæ ex ruinis & demolitionibus hujusmodi superfuerint, ad reparationem ædificiorum in dicto certficatorio mentionatorum, ac relinquarum domorum & ædificiorum ad dictam rectoriam de Cliffe prædict' spectantium, & non ad alios usus applicentur) liberè, libtè, & impunè valeas

by which the state and condition of it appeared;

license is granted to demolish, and build, according to the tenor of the said return.

& possis; aliquâ ordinatione, canone, vel constitutione ecclesiasticis, in contrarium facien' non obstantibus: Alias verò partes ædificiorum prædictorum, quas dicti commissarii nostri in dicto certificatorio reformandas, reparandas, sustinendas, & sustentandas esse etiam certificant, reformare, reparare, sustinere, & sustentare; & aulam prædictam (Anglicè *the hall*) in quatuor partes Anglicè rooms (scilicet duas cameras, Anglicè *two upper rooms or chambers*, & dua spacia inferiora, Anglicè, *two lower rooms*) ædificare, & convertere; secundùm ordinationes, canones & constitutiones ecclesiasticas, teneberia. Et ut de & super præmissis, nos vel vicarium nostrum in spiritualibus generalem, circa vel ante festum sancti *Michaelis* Archangeli jam prox' futur' debitè & authenticè certifies, seu certificari facias. In cujus rei testimonium, sigillum (quo in hac parte utimur) præsentibus apponi fecimus. Dat' vicesimo secundo die mensis Maii, Anno Domini, millesimo sexcentesimo septuagesimo nono, nostræque consecrationis anno secundo.

A. D. 1679.

## No. XXV.

Grind. Lond.  
fo. 34 a.  
Gibs. Cod. Jur.  
Eccl. App. § iv.  
fo. 1457.

Form of letters patent for rebuilding a church that is too ruinous to be repaired, or is placed in an inconvenient site (a).

*Literæ patentes regie majestatis concessæ pro erectione & fundatione nova ecclesiæ.*

Recites, that  
the old church  
was ruinous,  
and inconveniently placed,

*Elizabetha* Dei Gratiâ Angliæ Franciæ & Hiberniæ Regina, Fidei Defensor &c. Omnibus ad quos præsentis literæ pervenerint salutem. Cùm ex parte parochianorum & inhabitantium parochiæ de Woodham Waters in com' nostro Essexiæ, de patronatu perdilecti & fidelis consanguinei nostri *Thome* comitis Sussexiæ existen' London' dioc' per ipsum comitem nobis nuper expositum extitit paritèr & suggestum, quòd ecclesia parochialis prædict' in magnam ruinam & decasum dilapsa existit, quòdque rationæ magnæ distantiæ à villa de Woodham Waters in com' prædict' inhabitant' & residen' infra villam prædict' valde nociva existit, sic quòd legei & subditi nostri tam infra villam prædict' comoran' quam ad dictam villam frequen' & divina servitia in eadem ecclesiæ parochiali audire cupientes, multoties ad divina servitia ibidem celebrand' propter magnam loci distantiam adesse non possunt, verùm etiam infirmi, pregnantes, & alii impotentes infra villam prædict' sine grandi labore & periculo coporum suorum, ad dictam parochialem ecclesiam pro divinis servitiis ibidem audiend' & pro sacramentis ecclesiæ ibidem recipiend' tempore congruo venire minime valent & possunt: Sciatis igitur, quòd

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(a) See the Treatise, page 47.

nos præmissa considerantes, volumus, ac pro nobis, heredibus et successoribus nostris, per præsentem concedimus præfato Thomæ Comiti Sussexiæ, & heredibus & assignatis suis, quòd ipsi, in aliquo tali convenienti loco, prout eis seu eorum alicui magis expediens & necessarium fore videbitur, construere & edificare possunt de novo, infra parochiam de Woodham Waters prædict' unam aliam ecclesiam parochialem, unà cum cæmeterio eidem adiacen' quæ erit & vocabitur ecclesiæ parochialis de Woodham Waters prædict' in com' Essexiæ, distinctè & seperatim ab aliis parochiis, ac ipsam ecclesiam parochialem, cum sic erect' & edificat' fuerit, ecclesiam parochialem, de Woodham Waters in com' Essexiæ, pro omnibus inhabitantibus infra prædictam villam & parochiam de Woodham Waters, facimus, ordinamus, erigimus & stabilimus per præsentem perpetuis futuris temporibus duratur'. Ac quòd omnes & singuli inhabitantes infra villam & parochiam de Woodham Waters prædict' qui nunc sunt, & qui pro tempore erunt, de cætero imperpetuò habeantur & reputentur de parochia, & in parochia dictæ ecclesiæ parochialis de Woodham Waters prædict' de novo edificand'. Et quòd dicta antiqua ecclesia parochialis de Woodham Waters prædict' postquam illa nova ecclesiæ parochialis per præfatum Thomam Comitem Sussexiæ aut heredes vel assignat' suos sic erect' & edificat' fuerit, de cætero non erit, nec tenebitur, reputabitur, acceptabitur; ulterius ut ecclesiæ parochialis parochiæ de Woodham Waters; ac etiam quòd omnia & omnimoda sacramenta & sacramentalia de cætero erunt administrat' habit' & occupat' infra dictam ecclesiam parochialem de novo erigend' & edificand' pro omnibus & omnimodis paroch' prædict' ac pro omnibus & omnimodis aliis personis in eandem ecclesiam confluen' in tam amplis modo & forma, prout ea omnia & singula antehac habit' & usitat' fuere in dicta antiqua parochiali ecclesia de Woodham Waters prædict'. Et rector dictæ ecclesiæ parochialis & successores sui habeant, teneant, & possideant, omnes & omnimodas decimas, oblationes, obventiones, pensiones, portiones, fructus, proficua & emolumenta quæcunque dictæ rectoriæ quoquomodo pertinen' & spectan' in tam amplis modo & forma, prout prædictus rector, aut aliquis prædecessorum suorum, perantea habuerunt, & gavisì fuerunt. Volentes insuper, and per præsentem firmiter injungend' præcipien' pro nobis heredibus & successoribus nostris, omnimod' & omnimod' subditis nostris qui nunc sunt, & qui pro tempore erunt, cujusque gradûs sive conditionis fuerint, quòd permittant, & quilibet eorum permittat, rectorem ecclesiæ parochialis prædict' custod' bonor' & catallorum, ac aliorum ornamentor' ecclesiæ prædict' necnon parochianos inhabitantes parochiæ prædict' & successores suos pro tempore existen' & eorum quemlibet, quòd habeant, teneant, gaudeant, & possideant, omnia & omnimod' eis in hac concessione nostrâ concessa & confirmata, secundùm vim, formam & effect' concessionis nos-

and grants license to erect a new one in a place more convenient,

which shall be the parish church,

and be used and frequented as such,

notwithstanding the statute of mortmain.

træ præd' absque aliqua molestatione, gravamine, inquietatione, vexatione, seu perturbatione nostri, heredum vel successorum nostrorum aut aliorum officiarior' ministror' seu subditor' nostrorum, aut heredum vel successor' nostrorum quorumcunque; statuto de terris & tenementis ad manum mortuam non ponend' aut alio aliquo statuto, actu, ordinatione, provisione, sive restrictione inde in contrarium fact' edit' ordinat' sive provis' aut aliqua alia re causa vel materia quacunque, in aliquo non obstan'. Eò quòd expressa mentio de certitudine præmissor' seu eorum alicujus, aut de aliis donis sive successoribus per nos, vel per aliquem progenitor' sive prædecessor' nostrorum, præfato Thomæ Comiti Sussexiæ ante hæc tempora fact' in præsentibus minime fact' existit, aut aliquo statuto, actu, ordinatione, provisione, proclamatione, sive restitutione, in contrar' inde ante hac habit' fact' edit' ordinat' sive provis' aut aliqua alia re causa vel materia quacunque in aliquo non obstan'. In cujus rei testimonium has literas nostros fieri fecimus patentes, Teste me ipsâ apud Westm' vicesimo sexto die Junii anno regni nostra quarto.

Per breve de privato sigillo & de dat' prædict' auctoritate Parliamenti.

#### No. XXVI.

##### *Example of a survey of ecclesiastical dilapidations (a).*

*The President and Scholars of Magdalen College, Oxford, and the Rev. John Ventris, B. D. v. The Executors and Executrix of the late Dr. Hutchinson, Vicar of Beeding, in Sussex.*

Specification, report and estimate of the dilapidations that have been suffered to accrue, want of repairs, and re-instatement of waste and damages, at the parsonage-house or priory, barns, out-houses, fences &c., vicarage-house and store-house thereunto belonging, situate by the side of the River Adur; the chancel of the parish church, and other buildings appertaining to the augmented vicarage of Beeding or Sele, near Shoreham, in the county of Sussex, formerly in the incumbency or occupation of the Rev. Dr. *Hutchinson*, and belonging to the President and Scholars of the College of St. Mary Magdalene, Oxford.

##### STORE-HOUSE BY THE BANKS OF THE RIVER ADUR.

Repair the window-shutters, and make good the flint wall in several places, the coping and brick coins by the coal-yard. Repair the entrance-gates, and floor of upper room, the gates of the store-house, and repair the roof where necessary.

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(a) See the Treatise, page 76.

## VICARAGE-HOUSE AT BEEDING.

Take down, rake out, and rebuild the top of the chimney; point the shaft of the same. Repair the foundation in sundry places, and plaistering outside; repair ditto generally inside, the entrance-door and paving in front; repair the fences; repair and re-hang several of the gates.

## CARRIAGE-HOUSE AND STABLES.

Repair the windows, the foundation in sundry places; repair and secure the brick-work at the west end with an iron tie; also the brick-work on the beams, the thatch on the roof in several places &c.

## BARN &amp;c.

Repair the thatch, the weather-boarding, and fences by the same, and round yard, in many places, and the open fence to rick-yard; repair the gate between that and the farm-yard, and a little to the cow-pen; also the paling round garden and orchard, and the garden wall.

## CHANCEL OF CHURCH.

Repair the entrance-door and frame out of garden, the pews and doors; repair that part of the fence in church-yard next the garden, and the wall between church-yard and garden.

## PARSONAGE-HOUSE OR PRIORY OF SELE.

Pay for the labour to sunk fence under the hill in front of house, according to leave given to cut timber for the same from the President (the Rev. Dr. *Routh*), bearing date April 11, 1812, and in the possession of Mrs. *Hutchinson* (a). Repair the other fences round the meadow adjoining the garden &c., the weather-boarding to pig-styes and hovels.

DWELLING-HOUSE; ATTICS.—Re-instate the broken glass in windows, and repair the damaged plaistering in all the rooms, and on the stair-case; repair and secure part of the brick-work with iron ties, and repair the necessary plaistering &c. to the same.

ONE-PAIR STORY.—Re-instate the broken glass, and repair the damaged plaistering to all the rooms, and lead-lights in nursery; paint the shutters in dressing-room; repair window-

(a) Copy of the before-mentioned permission, which should be always obtained before trees are felled for such purpose:—"I hereby grant permission to the Rev. Dr. *Hutchinson* to take down ten elm trees, for the re-

pair of the fence round the house on the glebe at Beeding, in the county of Sussex. (Signed)

MARTIN J. ROUTH,  
Apr. 11, 1812. President."



boards in back chamber north; repair and secure brick-work on stairs with an iron tie, and repair the necessary plaistering to the same.

**GROUND-FLOOR STORY.**—Re-instate the skirting, papering &c. where the book-case formerly stood; re-instate the broken glass to all the rooms, ease and re-hang one of the sashes, repair plaistering on back stairs.

**BASEMENT STORY.**—Repair and secure brick-work in front of store-room with an iron tie; re-instate the broken glass, and repair the broken sink-stone.

**OUTSIDE.**—Secure brick-work in three places with iron ties, repair the chimney pots.

The sum of money to be paid by the representatives of the late Dr. *Hutchinson* to the new incumbent of the above augmented vicarage, in lieu of the before-mentioned dilapidations, which have occurred contrary to the terms of his lease under the President and Scholars of the College of St. Mary Magdalen, Oxford, according to an accurate survey and valuation made by me, on the 24th and following days of January, 1813, amounts to the sum of 80*l.* 3*s.* 6*d.*

Feb. 23, 1813.

JAMES ELMES, Surveyor.

## No. XXVII.

Covenants in bishop's leases do not bind the successor, unless such covenants have usually been inserted in former leases (*a*).

DAVENANT  
v.  
The Bishop  
of SARUM.  
Lev. part ii.  
p. 68.  
S. C. Vent.  
vol. i. p. 223, 4.  
Danv. vol. ii.  
p. 56. pl. 1.  
Keb. vol. i.  
p. 69.  
Hill. ult. Rot.  
868.

### DAVENANT v. The BISHOP of SALISBURY.

Mich. 24 Car. 2. in Banc. Reg.

On the part of the plaintiff it appeared, that the bishop's predecessor was seised of these lands, and in 1635 let them, and covenanted that he and his successors should pay all taxes during the term; and for breach assigns, that such a tax was laid by parliament for a royal aid in 1665, and that the bishop had not paid it. The defendant demurred, and had judgment, *first*, because it was not alleged that the bishop was seised *jure episcopatus*, and in pleading seisin in all *sole corporations*, the pleading must show *in quo jure* they were seised, otherwise of *corporations aggregate*. *Secondly*, this covenant was not good to bind the successor, unless such covenants had usually been inserted in former leases, which is not here shewn; and *thirdly*,

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(a) See the Treatise, page 77.

if such covenants had been in former leases, yet this one cannot oblige him to pay this new tax created by parliament, but must be understood of such taxes as were then in use, *scilicet* synodals &c., and Sir *Matthew Hale* cited a case formerly so adjudged.

## No. XXVIII.

Where certain mill-machinery, together with a mill, had been demised for a term to a tenant, and he, without permission of his landlord, severed the machinery from the mill; and it was afterwards seized under a *fi. fa.* by the sheriff, and sold by him: held, that no property passed to the vendee, and that the landlord was entitled to bring trover for the machinery even during the continuance of the term (*a*).

## FARRANT v. THOMPSON.

This case was an action of trover for mill-machinery. At the trial, before Lord *Tenterden*, (then Lord Chief Justice *Abbott*) at the Middlesex Sessions after Easter Term, the following appeared to be the facts of the case:—On the 10th of July, 1820, the plaintiff agreed, by an instrument in writing, to purchase of one *Richards*, for the remainder of a term of ninety-nine years, certain premises at Cudham, in Kent, on which *Richards* had erected a wind-mill, with the *appurtenances*, the same having been demised to him for the term of ninety-nine years, at a yearly rent therein mentioned; and the agreement contained a stipulation on the part of the plaintiff, to grant a lease of the premises to *Richards* for the term of thirty years, at the yearly rent of 80*l.*; the plaintiff paid the purchase-money, and *Richards* became his tenant, and paid rent according to agreement. In September, 1821, *Richards* offered to sell to the defendant *Thompson* part of the machinery of the mill; he was then about to remove to *Grays*, in *Essex*. A day was fixed for bringing the machinery to *Grays*, and it was then agreed that *Thompson* and his millwright should meet *Richards* at *Grays*, for the purpose of purchasing the machinery. The machinery was severed by the tenant from the mill, and while on the road from *Cudham* to *Grays* was seized in execution by the sheriff, under a *fi. fa.* at the suit of a third person, and the defendant afterwards became the purchaser, under the sheriff. It was contended at the trial, that the plaintiff was not entitled to recover, because the purchase by the defendant under the execution was equivalent to a sale in market overt, and that the property was thereby

FARRANT  
v.  
THOMPSON.  
Barn. & Ald.  
Rep.  
vol. v. p. 826.  
Trin. Monday,  
June 10th.

(a) See the Treatise, page 123.

changed, and that the plaintiff ought to have brought his action against the sheriff for wrongfully selling the goods; and, secondly, that as the goods were in possession of the tenant under a demise, trover would not lie for them during the term. The plaintiff obtained a verdict, but the Lord Chief Justice gave leave to the defendant to move to enter a nonsuit, and

Mr. (now Sir James) Scarlett then moved accordingly, and said, that the action was not maintainable against the defendant. Assuming that *Farrant* might have sued the sheriff or the plaintiff in the execution, still, the defendant being a *bona fide* purchaser without notice under a *fi. fa.*, was not liable. In *Manning's case* (a), it was resolved, that a sale by the sheriff by force of a *fi. fa.* should stand, although the judgment be reversed; for the sheriff who made the sale had lawful authority to sell, and by the sale the vendee had an absolute property in the term. In *Doe v. Thorn* (b), it was held, that if a sheriff sell a term under a writ of *fi. fa.*, which is afterwards set aside for irregularity, and the produce of the sale be directed to be returned to the termor, the termor cannot maintain ejectment to recover his term against the vendee under the sheriff. But, secondly, the goods being in possession of the tenant, under a demise, trover was not maintainable. The tenant was entitled to the use of them during the term, and the landlord cannot, therefore, maintain trover; he can maintain no action, except for waste or injury done to the inheritance. In *Gordon v. Harper* (c), the goods leased as furniture were wrongfully taken in execution by the sheriff; and it was held, that during the term, trover was not maintainable against the sheriff by the landlord, because the latter had not the right of possession. That case is expressly in point.

Lord Tenterden's opinion.

Lord Tenterden, then Lord C. J. Abbott.—I thought at the trial, and still think, that there is a material distinction between this case and that of *Gordon v. Harper* (d). In that case, the goods removed were personal chattels, and the tenant had not by any wrongful act put an end to his qualified possession of them. Here, however, they consisted of machinery annexed to the mill, and formed parcel of the inheritance, and, when wrongfully severed, became the property of the reversioner. As to the other point, the sheriff wrongfully took the goods of the plaintiff, instead of those of the tenant; he could acquire no title by his wrongful act, and could therefore convey no title to the defendant.

Judge Bayley's opinion.

To this Mr. Justice Bayley added, "I am of the same opinion. This case is distinguishable from *Gordon v. Harper* in

(a) 8 Co. 191.

(b) 1 M. & S. 425.

(c) Term Reports, vol. vii. p. 9.

(d) Ibid.

two particulars; first, there the goods removed were personal chattels, and, at the time of the seizure, continued to be in the qualified possession of the tenant, which the lessor agreed the lessee should have. Here the goods were parcel of the inheritance, and let to the tenant to be used, during the term, in a particular way, viz. in that particular place, and he, by his own act, put an end to that qualified possession. They are not in principle distinguishable from trees, which are parcel of the inheritance; to the use of which the tenant has only a qualified right during the term. If, however, they are separated by his own wrongful act, or the act of God, the tenant has no right to the use during his term, but they become absolutely vested in the person who has the next estate of inheritance. They then become his goods and chattels, when severed wrongfully, and did not thereby become the property of the wrong-doer, but of the landlord."

Mr. Justice *Holroyd* added, as his opinion, " I think trover the proper remedy. The machinery was let together with the mill, and was part of the mill. It was a part of the inheritance until the demise was made; when the demise took place, it contained part of the inheritance of the landlord, and part of a chattel real in the hands of the tenant in possession. By the lease or agreement the tenant has the use, not the dominion, of the property demised; and therefore, when he separated any part of it, to convert it from a chattel real to a chattel personal, his right of using it was at end for any legal purpose, that right being only to use it in the state in which it was before. In the case of a lease of a house, if a tenant pulls down any part of it wrongfully, and not for the purpose of repair, so as to constitute waste, the person who has the first estate of inheritance has a right to the materials of which that house was before composed; and I apprehend he has a right to immediate possession of those materials, in the like manner as he has an immediate right to the immediate possession of timber, where it is severed from the inheritance. In that case, when detached, either by the wrongful act of the tenant himself, or by the act of God, it immediately becomes the goods and chattels of the person entitled to the first estate of inheritance, and the right which had been for some time vested in the tenant has ceased. I think that the tenant's right was put an end to in this case by the separation of the machinery for an unlawful purpose, which was his own wrongful act; and that, being the goods and chattels of the landlord, as the person who had the first estate of inheritance in the mill, the tenant could have no right to use them as chattels personal, but only while they were part of the chattels real; and, upon the separation, the whole of the property became immediately vested in the landlord."

*Judge Holroyd's opinion.*

Judge *Best's*  
opinion.

Mr. Justice *Best* said he concurred in these opinions of his learned brothers.

Rule refused.

### No. XXIX.

#### MANNER OF TAKING DILAPIDATIONS, IN THE MEASURING BOOK (a).

N. B. The following examples, given in illustration of the foregoing Treatise, are actual surveys, which have been settled at the sums quoted, and selected at random.

*Dilapidations suffered to accrue at and to a leasehold house and offices, No. —, in — Street, in the occupation of A. B., and belonging to C. D.*

	Repairs, or full Costs of Repair.			Dilapidations, or Amount of Assessment for Neglect.		
	£	s.	d.	£	s.	d.
Roofs. — Repair the damaged tiling; clean and repair the damaged gutter- ing; point the flashing, and part of inside of parapet; repair and point part of chimney-tops, and point part of coping - - - - -	10	0	0	4	10	0
Attic story, front room, east.—Repair damaged plaistering and broken glass in lead-lights - - - - -	1	0	0	0	18	0
Back ditto.—Repair plaistering - - -	0	5	0	0	5	0
Front ditto, west.—Re-instate broken glass - - - - -	0	3	6	0	3	6
Repair damaged plaistering by chimney Stairs &c.—Repair damaged plaister- ing by side of stairs - - - - -	0	4	0	0	4	0
Two pair story, front room east.—Ease and re-fit the sashes - - - - -	0	8	0	0	8	0
Ditto west.—Repair cracks in wainscot, and re-instate damaged glass - - -	0	5	0	0	5	0
Ditto west.—Repair cracks in wainscot, and re-instate damaged glass - - -	0	10	0	0	10	0
Back room west.—Repair cieling, and re-instate broken glass - - - - -	0	8	0	0	8	0
Ditto east.—Repair and re-fit sash, re- pair crack in wall, and ditto by angle chimney - - - - -	0	10	0	0	7	0
Carried forward	£13	13	6	7	18	6

(a) See the Treatise, page 199.

## APPENDIX.

Hx

	£	s.	d.	£	s.	d.
Brought forward	13	13	6	7	18	6
Stairs.—Re-instate broken glass, and re-fit the sash - - - -	0	8	0	0	6	0
One pair story, large drawing-room.—Re-instate broken glass in windows	0	4	0	0	4	0
Small ditto adjoining.—Wash, scrape, stop and white the cieling, and paint, where painted before, twice in oil -	2	10	0	1	10	0
Back room west.—Repair cracks in wainscotting - - - -	0	3	0	0	3	0
Back ditto east.—All good.						
Ground floor, front parlour.—All good.						
Back ditto.—Repair cieling, (one crack) ease and re-hang the sashes, and re-instate the broken glass (three squares)	1	1	6	1	1	6
Back yard.—Repair several damaged places in the brick-work - -	1	0	0	1	0	0
Compting-houses, back compting-house. Repair, ease, and re-fit outside shutters - - - -	0	10	0	0	10	0
Repair and re-instate damaged papering in several places - - -	1	0	0	0	15	0
Front ditto.—Re-instate damaged papering, repair cieling walls, repair lobby and outside door - - -	0	15	6	0	10	6
Basement story, front kitchen.—Repair cieling; ease and repair sashes, re-instate broken glass (three squares)	1	0	0	1	0	0
Repair damaged step by door, and part of hearth by fire-place - - -	0	6	0	0	6	0
Back ditto.—Repair lead-lights, and re-instate broken glass - - -	0	14	0	0	14	0
Cleanse, empty, and repair the cess-pools, drains &c. into the common sewer - - - -	10	0	0	6	0	0
Front of house.—Repair and point damaged parts under windows and coping; flank wall - - -	3	0	0	3	0	0
Insert six iron cramps by floors, front and rear - - - -	6	0	0	6	0	0
General.—Wash, scrape, stop and white the cielings - - - -	10	0	0	6	0	0
Paint the usual outside wood and iron works, three times in oil - -	20	0	0	7	0	0
Paint the inside twice in oil, in good common colours - - - -	15	0	0	5	0	0
	<u>£87</u>	<u>5</u>	<u>6</u>	<u>48</u>	<u>18</u>	<u>6</u>

The notice for the above must be drawn up by the landlord's solicitor, addressed to the lessee or whom it may concern, and if there is more than six months to come of the lease, to desire him to do and perform such repairs to the satisfaction of the landlord or his architect, or to pay the sum therein specified (the smaller one) in lieu thereof. If the smaller sum or assessment of dilapidations is proceeded for, there can be no doubt of success; but if the larger or full amount of repairs, unless under church holding, or special expressed covenants, it possibly may not be recovered.

The notice should begin in some such manner as the following:

To *A. B.* tenant of the house No. —, in — Street, belonging to *C. D.*, landlord, or whomsoever it may concern.

You are hereby required to do and perform, within — months (*as the case may be*) from the present date, all and singular the following repairs, and re-instatements of waste, dilapidations, and want of repair, at and to the messuage or tenement and premises which you now hold of the aforesaid *C. D.* of —, situate and being No. —, in — Street, in the county of Middlesex, or city of London, (*as the case may be*) according to the following schedule or specification of dilapidations made by *Mr. J. E.*, the architect appointed by the aforesaid *C. D.* on a proper survey of the premises, as follows, namely (*now insert, in running lines without sums, the foregoing specification, and conclude, if the lease is within four or six months of expiring*) or in lieu thereof pay to the aforesaid *C. D.* the sum of 48*l.* 18*s.* 6*d.*, in lawful money of this realm, as a fair compensation or assessment of dilapidations, want of repairs, and waste, which have been suffered to accrue in and upon the aforesaid leasehold premises.

*E. F.*, solicitor to the landlord, *C. D.*

Witness, —.

No. XXX.

Manner of giving a second notice, where the whole or any part of the former has been neglected (*a*).

Survey, valuation and report of certain dilapidations, want of repairs, and unperformed covenants agreed to have been done at a house situate No. —, in — Street, in the county of Middlesex, in the tenure or occupation of *Mr. C. J. G.* and *M. G.* or their under-tenants, belonging to *J. S.* of —, in the county of Kent, Esq.

Whereas by a lease granted by the aforesaid *J. S.* to the aforesaid *Charles James G.* and *Margaret G.*, bearing

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(a) See the Treatise, page 199.

date the 6th June, 1807, for the term of seven years, they agree for themselves, their executors, administrators or assigns, once in three years to paint all the outside wood and iron works and posts, rails and pales, twice in oil, with good materials, and in a workmanlike manner; and also shall and will, at his or their own proper costs and charges, from time to time during the said term, well and sufficiently repair, uphold, support, sustain, maintain, tile, glaze, lead, paint, purge, scour, cleanse, empty, amend and keep the said messuage or tenement, yard and premises, and all other erections and buildings which, during the term hereby granted, shall be erected on the said premises, and all pavements, walls, fences, pipes, gutters, waters, water-courses, privies, sinks, drains, sewers, wydraughts and appurtenances, and all necessary reparations, amendments and cleansings, shall yield up, at the determination, together with all pavements, floors, wainscots, partitions, locks, keys, bolts, bars, hinges, staples, windows, window-shutters, window-frames, hearths, slabs, chimney-pieces, dressers, shelves, pumps, water-pipes and such other things which now are and which shall or may be standing, being or set up in and upon the said demised premises, or any part thereof.

And whereas the aforesaid *John S.* did, on or about the 16th May, 1814, apply to, employ and commission the undersigned *James Elmes*, architect and surveyor, to survey, value and report upon the several dilapidations, want of repairs and other unperformed covenants of the aforesaid lease, who, on the 19th and other days of May following, did survey, value and assess the amount of the said dilapidations, want of repairs and other unperformed covenants by the said *Charles James G.* and *Margaret G.* to be of and to the amount of 48*l.* 16*s.*, which said amount he hereby declares to be owing and due to the said *John S.*, in consideration of the aforesaid dilapidations, want of repairs and other unperformed covenants: and the following schedule is a true account of such dilapidations, want of repairs and other unperformed covenants; as witness my hand, this 28th day of June, 1814,

JAMES ELMES,  
Architect and Surveyor.

#### SCHEDULE.

Repair and point the pantiling on roof of house; repair and solder the gutters; repair and point the brick-work of parapets and chimney-tops.



**FRONT ATTIC, South.**—Repair the window-sills and sashes; putty the glass, and repair the pulley-stiles; replace lock and key to closets and to room doors, and repair plaistering. **North.**—Repair sashes, sash-frames and window-sills; replace a chimney-board, and a key to the cupboard. **Landing.**—Repair plaistering on wall and cieling; repair window-sill and sash, and replace one line.

**TWO PAIR, North Chamber.**—Provide and fix a new mantle to chimney; repair pulley-piece and sill; replace a key to closet; fasten chimney-shelf; repair lock, and provide a key to the door; stop up a hole in partition, and repair papering over the same. **South Chamber.**—Repair stucco reveals of windows, and plaistering of cieling; provide and re-fix two locks and keys to closet doors, and a lock and key to door of room; repair plaistering and papering. **Landing.**—Provide and re-fix a new bead to window.

**ONE PAIR, North Chamber.**—Repair window-sill; provide and re-fix a new line to shutter, and one fastening to the same, two locks and keys to closet, and one lock and key to room doors. **South Room, or Drawing Room.**—Repair, ease and re-hang the shutters, provide and re-fix one fastening; repair window-sill and soffit of chimney. **Landing.**—Provide and fix a proper framed and pannelled lifting shutter and bar, and a new bead and stop to the window.

**GROUND FLOOR, South Parlour.**—Provide and relay a new inside hearth, and fix in one new pane of glass in the sash; replace two sash and one shutter-line, and fastenings to the same; repair the cieling, and outside oak sill, replace two beads to the sash, one lock and key, one other key to the closet doors, and one new pulley to the south window; repair and re-hang the flaps over sliding shutters, and provide and re-fix a new brass lock to the door. **North Room.**—Repair sash; repair, ease and re-hang shutters, provide a new key to closet door, and a new Portland outside hearth to chimney, and one lock and key to the closet door; repair lock of street door; provide and replace a proper wrought iron bar fastening; repair cieling of hall; re-instate and repair bases, cornice, and other defective parts of the frontispiece; provide and re-fix new stone curb, and re-fix the iron railings.

**BASEMENT STORY, Best Kitchen.**—Repair dresser, drawer and runners; ease and re-hang the shutters; repair back linings, and re-instate two locks to dresser drawers, and one ditto to closet; repair wainscotting by fire-place, and skirting in several places; provide and re-fix a lock and key to door between two kitchens; ease and re-hang shutters; repair the back linings and door-sill; provide and re-fix beads, and re-

pair saah; repair plaistering in sundry places; provide and re-fix a new curb to sink; repair foot-tile paving; provide and re-fix a lock and key to door under stairs; repair plaistering by ditto, and nosings to kitchen stairs; repair arches of coal-cellars; open and cleanse the drains; provide and re-fix four locks and keys to cellar-doors; repair jambs and linings of door-case to kitchen and cellar doors in area; repair and point brick plinth of house; repair paving in back yard; repair privy door, wainscotting and plaistering; empty and cleanse the privy; repair joists and floor of privy.

Paint all the outside wood and iron work, posts, rails and pales, twice in oil, and paint the said messuage or tenement according to the before recited covenants.

As witness my hand, this — day of —,  
*J. E.*,  
 Surveyor to the said *J. S. Esq.*

## No. XXXI.

Form of notice under express covenants to leave in as good a state of repair as at first (a).

Dilapidations suffered to accrue and re-instatement of waste at and to the house and offices No. —, in — Street, in the city of London, belonging to *A. B. Esq.* and in the tenure or occupation of *C. D.*, according to the covenants (b) of the lease granted by the aforesaid *A. B. Esq.* to *E. F.*, and bearing date —.

Roof.—Repair the tiling on all the roofs; repair and solder, where necessary, the cracks in the gutters, and leave them all clean and entire; point the flashings, brick on edge,

(a) See the Treatise, page 199.

(b) The covenants above-mentioned are expressly strong, and are as follows:—

“ And also that he the said —, his executors administrators, and assigns, shall and will, from time to time and at all times during the term hereby granted, when and as often as need or occasion shall be and require, well and sufficiently repair, uphold, slate, tile, glaze, paint, cleanse, amend and keep in good order and condition, the said messuage or tenement, and all and singular other the premises hereby demised, and every part thereof, with

the appurtenances, together with all courts, yards, gardens, areas, vaults, cellars, sailors, party wall and other walls, ways, passages, lights, easements, waters, water-courses, pavements, posts, pales, rails, sinks, sewers, drains, necessaries, wydraughts, pipes, pumps and gutters, belonging or in anywise appertaining to the same premises, or any part thereof; and all erections, buildings, additions, or improvements whatsoever, which now are or shall or may at any time during the continuance of this demise, be erected, built, or made in or upon the said premises hereby demised, or any

copings &c.; repair and point chimney-shafts, where necessary; repair brick-work to party fence wall, and point decayed brick-work under windows.

**ATTIC STORY, Front Room.**—Repair the damaged plastering of walls and cieling; wash, scrape and white the same.—**Small Front Room.**—Repair the damaged plastering to cieling (nearly all wanted to be new.); repair the floor boards; ease and re-hang the sashes and doors. **Back room.**—Repair the plastering to walls and cieling (as above); repair the floors and sashes, ease and re-hang the same and doors. **Staircase and Landing.**—Cut out and repair the damaged and decayed parts of walls and cieling; repair the partitions; re-instate the broken glass, and nosings and other parts of stairs.

part thereof; and in particular shall and will, twice in every seven years during the term hereby granted, in a good and workmanlike manner, paint or cause to be painted all the outside wood-work and iron-work of the said messuage or tenement and premises hereby demised, twice over with good and proper oil colours; and shall and will also cause, in every seven years during the same term, in the manner, paint or cause to be painted twice over with good and proper oil colour, all the wood-work and stone-work which, in the inside of the said messuage or tenement and premises hereby demised, have before been painted; and the said messuage or tenement, and all and every other the premises, with the appurtenances, so well and sufficiently repaired, upheld, slated, tiled, glazed, painted, cleansed, amended and kept as aforesaid, together with all glass, glass windows, sashes, casements, shutters, leaden gutters, ridges and hips, leaden pipes, leaden and other cisterns, cocks, marble and other water-closets, basins, plugs, and other things thereto belonging, marble and other chimney-pieces, slabs, foot-paves, hearths, jambs, covings, doors, partitions, wainscots, closets, shelves, drawers, dressers, stoves, locks, keys, bells, cranks, bolts, bars, latches, fastenings, hinges, pegs, staples and all other things whatsoever, set up, fixed, fastened, or which, during the continuance of this demise, shall be set up, fixed, or fastened, in, upon, or about the said premises hereby demised, or any part thereof, in the like good order, repair and condition, shall and will, at the end or other sooner determination of the said term hereby granted, peaceably and quietly leave, surrender and

yield up to the said —, his heirs or assigns, or the person or persons who, for the time being, shall be entitled as aforesaid, or such person or persons as he or they shall for that purpose appoint.

“And also that it shall and may be lawful to and for the said —, his heirs or assigns, and to and for the person or persons who, for the time being, shall be certified as aforesaid, and every of them, and their agent or agents for the time being, or any person or persons appointed by them for the purposes hereafter mentioned, and respectively with or without workmen or others, at convenient times in the day-time, four times or oftener in every year during the said term hereby granted, to enter and come into and upon, and survey and examine all and every the said premises hereby demised or any part thereof, as to the state and condition of the repairs thereof, and to take any plan or plans thereof, or of any part thereof, and also to take a schedule or inventory of the fixtures and other things so to be left as aforesaid, or for any other lawful purpose, and of all defects and wants of reparation, which shall be then and there at any time found, to give or leave, or cause to be given or left, notice or warning in writing, either to the said —, his executors, administrators or assigns, or to leave, or cause to be left, such notice or warning at or upon the said demised premises, or some part thereof, to or for the said —, his executors, administrators or assigns, to repair and amend the same, within the space of three calendar months next after every such notice so given or left as aforesaid.”

**TWO PAIR STORY, Front Room.**—Repair the decayed and bulged lathing and plaistering; re-instate the broken glass to fire-place; repair the floor in several places; ease and repair the sashes and doors. **Middle Room.**—Repair the cieling, where wanting (very bad); ease, repair and re-hang the sash and door; repair the wood sill, and re-instate the broken Portland slab and marble. **Back Room.**—Repair the plaistering of walls, and lathing and plaistering of cieling; repair the floor, where necessary, and re-instate the broken glass. **Landing and Stairs.**—Repair the cielings and wall, and re-instate the nosings and otherwise repair the stairs.

**ONE PAIR STORY, Front Room.**—Repair the plaistering of walls, and lathing and plaistering of cieling; ease, repair and re-hang the sashes and doors; re-instate the defective beads to sash-frames; re-instate the broken glass. **Middle Room.**—Repair the plaistering of walls and cieling; ease, repair and re-hang the sashes, and re-instate the broken glass. **Back Room.**—Repair the damaged and decayed plaistering and wood-work, where necessary. **Landing and Staircase.**—Repair the damaged plaistering on walls and cielings; re-instate nosings, and otherwise repair the stairs. **Entrance Passage.**—Re-instate the damaged plaistering of walls, lathing and plaistering of cieling.

**GROUND FLOOR, Front Room.**—Repair the cieling and walls; ease and repair and re-hang the sashes and doors. **Middle Room.**—Repair the lathing and plaistering of cieling and walls; ease, re-hang and repair the doors, sashes and frames; re-instate the broken glass, broken Portland stone to mantle, and slab to fire-place. **Third Room (now entered from yard, and used as a work-shop.)**—Knock down the damaged cieling; fix the joists straight; re-lath, plaster, set, and white the same; repair, wash, scrape and white the walls; repair the damaged floor, and otherwise re-instate the room as per plan, and as heretofore. **Back Workshop in Yard.**—Repair damaged floor, and tiling on roof; re-instate the broken glass and other defective parts of the same; repair, ease and re-hang the back door. **Yard.**—Repair and point the defective parts of party fence and other walls, and repair the paving.

**BASEMENT STORY, Back Cellar.**—Repair the decayed and damaged plaistering, where necessary. **Wash-house.**—Re-instate the defective and damaged cieling and walls; repair and re-instate the brick paving; repair the sashes and frames, and re-instate the broken glass. **Front Kitchen.**—Repair and re-instate the cieling as formerly, and repair the plaistering on walls; cleanse, empty and repair the drains, cess-pools, privy &c. into the common sewer.

**GENERAL.**—Wash, scrape, stop and white the ceilings and walls; paint all the outside wood and iron work, where painted before, or usually painted, three times in oil; the inside wood and iron work, where painted before, or usually painted, twice in oil, in good common colours, or in lieu of the re-instatements of damaged and dilapidated parts of the aforesaid leasehold tenements, which must all be done within three months from the date of this notice of repairs, according to the covenant of the lease, the aforesaid tenant is to pay to his landlord, at the expiration of the same, as a fair compensation or assessment of dilapidations which have been suffered to accrue in and upon the aforesaid leasehold house and tenement, the sum of 36*l.* 15*s.*

## No. XXXII.

Form of notice to repair, during the continuance of lease (a).

SIR,—Having surveyed the house and offices occupied by you, being No. —, situate on the north side of —, and belonging to Sir *H. D.*, Bart., the lease of which about thirteen years remains unexpired, and find the following repairs necessary to be done, and according to the express covenants contained in the lease, that unless they are done within the space of three calendar months from the date hereof, you will be subject to the forfeiture of the same, on the conditions therein expressed.

*J. E.*,

Surveyor to the said Sir *H. D.* Bart.

**ROOF.**—Rake out and point the chimney-shaft, as low as necessary; take down and re-set the chimney-pots; strip the plain tiling of roof, where it may be found necessary, and otherwise repair the tiling throughout; rake out and point with blue mortar the back parapet; take up and relay the Portland stone coping on front parapet as far as it will go, and provide what new may be wanting; repair and solder the gutters, and leave them in good condition.

Erect scaffolding to front next street; rake out the joints, and repair the defective and damaged brick-work, roughed and gauged arches; clean down the brick-work and such, point the same with the best white pointing mortar, with stopping mortar, as near the colour of the brick-work as possible; rake out and flat point such parts of the back front as may be found

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(a) See the Treatise, page 199.

necessary; repair and rake out and point all other parts of the defective brick-work on the premises; scrape, clean and repair the iron railing to area in front of house, and prepare it for painting.

**ATTIC STORY, Front Room.**—Wash, scrape, stop and white the cieling and walls; ease, repair and re-hang the sashes and doors; repair the floor, where damaged; paint the doors, sashes, frames, and all the necessary wood-work. Back ditto.—Knock down the present old cieling; fir out and make the joists straight; re-lath, plaister, set and white the same and walls; paint all the sashes, doors, frames, and other usual wood-work. Staircase and Landing.—Cut out and repair decayed parts of plaistering; wash, scrape, stop and white the same; paint the window and frame, and linings &c.; cut out and repair the nosings of stairs, where worn out.

**TWO PAIR STORY, Front Room.**—Wash, scrape, stop and white the cieling; ease, repair, re-hang sashes, shutters and doors; repair the sills to sash-frames; paint wainscot partitions, sashes, shutters, doors and frames, and re-instate the broken glass. Back Room.—Wash, scrape, stop and white the cieling and walls; repair the floor, where necessary, and paint the sashes, frames, doors, chimney-grounds, and other usual wood-work. Landing and Stairs.—Wash, scrape, stop and white the cieling and walls; paint the sash, frame, window-linings &c., and repair the worn-out nosings &c.

**ONE PAIR STORY, Front Room.**—Wash, scrape, stop and white the cieling; ease, repair, re-hang sashes and door; put new beads to windows, where wanting; paint wainscot partitions, sashes, frames, shutters, and doors; re-instate broken glass. Back Room.—Cut out and repair decayed parts of cieling, and wash, scrape, stop and white the same; paint the wainscot partitions, sashes, frames, doors, chimney-grounds, and other usual wood-work, and repair damaged parts of floor. Landing and Stairs.—Wash, scrape, stop and white the cieling, and cut out and repair damaged parts of plaistering on walls, and repair the same; paint the window, shutters, linings, frame, and other usual wood-work; repair nosing of stairs, where worn out or otherwise damaged. Entrance Passage.—Knock down the cieling; fir the joists straight; re-lath, plaister, set and white the same and walls; paint wainscot partition door, frame, skirting, and other usual wood-work.

**GROUND FLOOR, Front Room.**—Wash, scrape, stop and white the cieling and walls; ease, re-hang sashes, doors, and shutters, and paint the same, wainscot partitions &c., and repair the floor, where damaged; re-instate broken glass. Back

Room.—Wash, scrape, stop and white the cieling and walls; paint wainscot partitions, sashes, frames, shutters, doors, and mouldings round Portland stone jambs to fire-place, and other usual wood-work. Counting-house.—Wash, scrape, stop and white the ceiling and walls; paint wainscotting and all other wood-work; ease, re-hang sashes, doors &c., re-instate broken glass. Stairs.—Wash, scrape, stop and white the cieling and walls; paint the wainscot partition, and other usual wood-work; repair nosings of stairs, where worn out. Passage.—Wash, scrape, stop and white the cieling and walls; paint wainscot partition, door and frame; repair the floor, where decayed. Wash-house.—Repair, wash, scrape, stop and white the cieling and walls; take up and re-lay tile paving, using such as sound and fit for use, and provide what new may be wanting, of the same quality as at present; ease, repair, re-hang the door and wood casement, and paint the same; re-instate broken glass. Front Kitchen.—Wash, scrape, stop and white the cieling, ease, repair, re-hang the sashes, shutters, doors, and paint the same, and wainscot partition; and dressings to fire-place, and all other usual wood-work; re-instate broken glass. Workshops in Back Yard.—Repair tiling on roof, where damaged; repair floor, and re-instate broken glass.

Clean, empty and repair the drains, cesspools and privies into the common sewer.

All the before-mentioned works to be done in the best and most substantial manner, using the best materials of their several sorts, and to the satisfaction of Mr. *James Elmes*, the architect appointed by the landlord to superintend the afore-said works and repairs. All the usual outside wood and iron works to be painted three times in oil, in good common colour; and the usual wood and iron work, except where specified to the contrary, to be painted twice in oil, in good common colour.

### No. XXXIII.

#### Form of general notice to repair (a).

To Mr. *J. M.*, his executors, administrators or assigns, tenant of the house situate at the east corner of —, next the high road leading from — to —; or to Mr. *W. L.*, under-tenant of the before-mentioned premises, belonging to *W. P.* of —, Esq., or whomsoever it may concern.

SIR,—You are hereby required to do and perform, before the 25th day of March now next ensuing the date hereof, all

(a) See the Treatise, page 199.

and singular the following repairs, and re-instatements of waste, dilapidations, and want of repairs, at and to the messuage or tenement and premises which you hold of the aforesaid *W. P.* Esq. —, situate and being the east corner house of — Street, next the high road leading from — to —, in the county of —, according to the following schedule, or specification of dilapidations, made by Mr. *James Elmes*, the architect appointed by the aforesaid *W. P.* Esq. on a survey made of the aforesaid premises, on the 11th March, 1823, as follows, namely:

As witness my hand, this — day of —.

*J. E.,*

Surveyor to the said *W. P.*, Esq.

#### BEDSTEAD MANUFACTORY.

**Roof.**—Rip and relay the present slating, using such of the old ones that are sound and good, and provide what new may be required; repair boarding, where necessary, and repair the ends of rafters; take off the brick on edge parapet; rake out defective joints of brick-work, cut out damaged and decayed parts, and repair with new; re-set the brick on edge parapet to the same height as at present.

**SHOP.**—Ease and re-hang sashes; repair damaged sash-frames, and re-instate broken glass in the same, and sash glass in loop-hole door.

**STAIRS.**—Re-instate the worn treads, where necessary.

**GROUND FLOOR SHOP.**—Rake out and point defective brick-work; ease and re-hang doors, and re-instate broken glass, and repair floor, where necessary.

**CELLAR.**—Rake out, point and otherwise repair damaged and decayed brick-work.

**SMALL BACK YARD.**—Take up and re-lay paving, and provide what new may be required, of the same quality as the present; cut out decayed and damaged brick-work to party fence wall, and rake out and point defective joints to the same.

#### DWELLING-HOUSE AND FRONT SHOP.

**Roof.**—Strip off the present old slating; fir the rafters straight, and repair boarding for slates, where required; re-lay the roof with the present slates, as far as they will go, and provide what new ones may be required; repair wood coping on parapet, and rake out and point defective joints of brick-work underneath ditto; repair and solder cracks in lead-gutters, and re-lay lead on hips and ridges.



**ATTIC STORY, Front Room.**—Wash, scrape, stop and white the cieling; ease and re-hang sashes. **Back Room.**—Wash, scrape, stop and white the cieling and walls; ease and re-hang sashes, and re-instate bead to sash-frame. **Landing and Stairs.**—Cut out damaged plaistering on walls; lath, plaister and set the same, and white all the plaistering on walls and cielings; re-instate broken glass.

**TWO PAIR STORY, Front Room.**—Wash, scrape, stop and white cieling and walls, and re-instate broken glass. **Back Room.**—Wash, scrape, stop and white the plaistering on walls and cieling; repair sash-frame, and re-hang sashes. **Landing and Stairs.**—Cut out damaged places on walls and cieling; lath, plaister and set the same; wash, scrape, stop and white the walls and cielings to strings of stairs; re-instate broken glass.

**ONE PAIR STORY, Front Room.**—Wash, scrape, stop and white the cieling; re-hang sashes; provide what new lines and beads may be wanting, and re-instate broken glass. **Back Room.**—Wash, scrape, stop and white the cieling, and re-instate broken glass. **Landing and Stairs.**—Wash, scrape, stop and white the plaistering on walls and cieling to strings of stairs, and re-instate nosings to treads.

**GROUND FLOOR, Shop.**—Re-instate damaged places in cieling; repair floor, and re-instate broken glass. **Small Parlour.**—Ease and re-hang sashes; provide what new lines and beads may be wanting; re-instate broken glass. **Passage and Stairs to Back Door and Kitchen.**—Re-instate all the worn nosings to treads; cut out and re-instate damaged and decayed places on plaistering on walls and cielings.

**BASEMENT STORY, Kitchen.**—Repair floor, where necessary; wash, scrape, stop and white the plaistering on cieling; ease and re-hang sashes, providing what new beads and lines that are wanting, and re-instate broken glass. **Cellar.**—Take up and re-lay paving; rake out and point decayed joints of brick-work.

Cleanse, empty and repair all the drains and cesspools in and up to the common sewer.

Paint all the usual inside wood and iron work twice in oil, in good common colours, and all the outside wood and iron work, where painted before, three times in oil; provide and fix all proper locks, bolts, latches, bars, and other necessary fastenings to doors, windows, and shutters, as specified in the lease, or in lieu thereof, pay to the aforesaid *W. P.*, Esq. the sum of 35*l.* 15*s.* in lawful money of this realm, as a fair com-

penation or assessment of dilapidations, want of repairs, and waste, which have been suffered to accrue in and upon the aforesaid leasehold premises.

## No. XXXIV.

Form of a notice to be delivered to a tenant, after notice to repair, and, on visiting the premises, it is found, he has not complied (a).

To Mr. A. B., of —, near —, in the county of —.

In pursuance with the notice delivered by me at your house at — aforesaid, on the 6th June last, specifying sundry repairs and dilapidations in the house, barns, out-buildings and other premises, held by you under lease from C. D., Esq., I have this day inspected and surveyed the said premises, and finding none of the said repairs and dilapidations repaired or re-instated, I do hereby give you notice, that the several pains and penalties recited in your covenants of lease for such non-performance, are and have been incurred by you, and that the solicitor to the said C. D., Esq. will proceed to eject you accordingly.

As witness my hand, this 7th day of August, 1819,

J. E.,  
Architect to the said C. D., Esq.

Delivered a true copy of the above at Mr. —'s house, at —, on the 7th August, 1819.

Witness, J. E.

## No. XXXV.

## BURCHELL v. HORNSBY (b).

An action on the case in the nature of waste lies at suit of a landlord against his tenant for acts done by the latter, while holding over after the expiration of a notice to quit.

This was an action on the case in the nature of waste, for an injury to plaintiff in his reversionary estate and interest in a house and garden at *Parson's Green*. The declaration stated,

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(a) See the Treatise, page 199.

(b) See the Treatise, page 199.

that while the defendant possessed the premises as tenant to the plaintiff, and while the reversion thereof belonged to the plaintiff, the defendant did the several acts complained of.

It appeared in evidence, that the defendant, holding as tenant from year to year, had at Michaelmas 1807, received a notice to quit at the following Lady-day, and that several of the acts of waste described in the declaration had been committed after the 25th of March, 1808.

*Park* contended, that for these the plaintiff's remedy was trespass, and not case. The tenancy determined when the notice to quit expired, and the relation of landlord and tenant then ceased to exist between the parties. After that period it was impossible that the plaintiff should be injured in his reversionary estate and interest; for there being no term or particular estate subsisting, there could be no reversion.

Lord *Ellenborough*.—While the possession remained in the tenant, the landlord may be considered as entitled to the reversion; and although the landlord might have treated the tenant holding over after the expiration of a regular notice to quit as a trespasser, it does not follow that he might not waive the trespass, and bring the present action.

The cause was afterwards referred.

*Garrow* and *Comyn*, for the plaintiff; *Park* and *Jervis*, for the defendant.

#### No. XXXVI(a).

The following case of *Cole v. Greene* (b) sets the whole doctrine of the law of waste in so clear a light, that I am induced, from its great value to architects and owners of houses, to give it entire.

This case was a writ of error to Parliament of reversal of a judgment given in the Court of Hustings in London.

Charles the Second, by the grace of God, of England, Scotland, France, and Ireland king, defender of the faith &c. To our trusty and well beloved Sir *John Vaughan*, knt. our Chief Justice of the Bench, Sir *Matthew Hale*, knt. Chief Baron

(a) See the Treatise, page 158, and the whole of the fourth chapter on Waste, to which it immediately refers.

(b) Lev. Rep. part i. p. 309. Sand. Rep. vol. iii. p. 228. Case 42.

of our Exchequer, Sir *Christopher Turner*, knt. another Baron of our Exchequer, Sir *Richard Rainsford*, knt. late one other Baron of our said Exchequer, and now one of our Justices assigned to hold pleas before us, and Sir *William Morton*, knt. another of our Justices assigned to hold pleas before us, greeting:—Whereas by our letters patent of commission, under our great seal of England, lately directed to you the said Sir *John Vaughan*, Sir *Matthew Hale*, Sir *Christopher Turner*, Sir *Richard Rainsford*, Sir *William Morton*, and to Sir *Wadham Wyndham*, knt. now deceased, then one of our Justices assigned to hold pleas in our Court before us, reciting, that because on the behalf of *William Cole*, Esq. we were informed, that in the record and proceedings of a certain plaint which was before *William Bolton*, then late Mayor of the city of London, and Sir *Robert Vyner*, knt. and bart., and Sir *Joseph Sheldon*, knt. then late sheriffs of the said city, in the hustings of London, by our writ, between the said *William Cole* and *Henry Greene*, for that the said *Henry* committed waste, sale and destruction in houses in the parish of St. Giles without Cripplegate, London, which he holds for a term of years of the said *William Cole*, as assignee of *John Hillard*, gent. who demised the same to the said *Henry Greene* for the said term, to the disinheriting of the said *William Cole*, and against the form of the provision in such case provided, and also in the giving of judgment in the same plaint before Sir *William Peake*, knt. then late Mayor of the said city, and Sir *Dennis Gauden*, knt. and Sir *Thomas Davies*, knt. then late sheriffs of the said city, in the said Court of Hustings, as it was said, manifest error had intervened, to the great damage of the said *William*, as by his complaint we were informed; and that we being willing that the error, if there were, should in due manner be corrected, and full justice done to the parties aforesaid, assigned you the said Sir *John Vaughan*, Sir *Matthew Hale*, Sir *Christopher Turner*, Sir *Richard Rainsford*, Sir *William Morton*, and the said Sir *Wadham Wyndham*, five, four, three or two of you, our Justices, to look over and examine the record and proceedings, as well in the said plaint which was by our said writ, as in the giving of judgment in the said plaint, with all things touching the same, in the presence of the said Mayor and sheriffs of the said city of London, to be thereto warned by you, five, four, three or two of you, if they chose to be present at the Guildhall of the said city, and to correct the error assigned in the record and proceedings aforesaid, or in the giving of judgment in the said plaint, if any there should be found to be, and to do full and speedy justice therein to the parties aforesaid, as according to the law of our realm of England, and the custom of the said city, should be just, and therefore we commanded you and the said Sir *Wadham Wyndham*, five, four, three or two of you, that at a certain day, which you,

five, four, three, or two of you should appoint in that behalf, you, five, four, three or two of you should go to the said Guildhall of the said city, and do and perform all and singular the premises in form aforesaid, doing therein what should appertain to justice according to the law of our realm of England and the custom of the said city; and because on the behalf of the said *Henry Greene* we are now informed, that in the reversing of the said judgment, and also in the giving of judgment thereupon for the said *William Cole* against the said *Henry Greene*, before you the said Sir *John Vaughan*, Sir *Matthew Hale*, Sir *Christopher Turner*, Sir *Richard Rainsford*, and Sir *William Morton*, our said commissioners, or some of you, by virtue of our said commission, as it is said, manifest error hath intervened, to the great damage of the said *Henry Greene*, as by his complaint we were informed: we being willing that the error, if any there, should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if the first judgment given in the Court of the Hustings, London, be reversed before you, or some of you, and judgment be thereupon given for the said *William Cole* against the said *Henry Greene*, then without delay you distinctly and openly send the record and proceedings aforesaid being inspected, we may further cause to be done thereupon, with the assent of the lords spiritual and temporal, in the same Parliament, for correcting that error, what of right and according to the law and custom of our realm of England ought to be done. Witness ourself at Westminster, the 13th day of May, in the 22d year of our reign.

Return.

The answer of the within-mentioned Sir *John Vaughan*, Sir *Matthew Hale*, Sir *Christopher Turner*, Sir *Richard Rainsford*, and Sir *William Morton*, to this writ:—

The record and proceedings within specified, with all things concerning the same, we certify to our lord the king in his present Parliament, in a certain record to this writ annexed, as within we are commanded.

*J. V., M. H., C. T., R. R., and W. M.*

Be it remembered, that on Wednesday, the 16th day of December, in the twentieth year of the reign of our lord Charles the Second, by the grace of God, of England, Scotland, France, and Ireland, king, defender of the faith, &c. at the Guildhall of the city of London, come Sir *John Vaughan*, knt. Chief Justice of our said lord the king of the bench; Sir *Matthew Hale*, knt. Chief Baron of the Exchequer of our said lord the king; Sir *Christopher Turner*, knt. another Baron of the Exchequer of our said lord the king; and Sir *William Morton*, knt. one of the Justices of our said lord the king,

assigned to hold pleas before our said lord the king, assigned to look over and examine the record and proceedings of a certain plaint, which was in the hustings of our said lord the king of London, before *William Bolton*, late mayor of the city of London, and *Sir Robert Vyner*, knt. and bart., and *Sir Joseph Sheldon*, knt. then sheriffs of London, by the writ of our said lord the king, and also the giving of judgment in the said plaint, before *Sir William Peake*, knt. late mayor of the said city, and *Sir Dennis Gauden*, knt. and *Sir Thomas Davies*, knt. late sheriffs of the said city, in the hustings of the said city, between *William Cole*, esq. and *Henry Greene*, for that the said *Henry* committed waste, sale and destruction, in houses, in the parish of St. Giles without Cripplegate, London, which he holds for a term of years of the said *William Cole*, as assignee of *John Hilliard*, who demised the same to the said *Henry* for the said term of years, to the disinheriting of the said *William Cole*, and against the form of provision in such case provided, as it is said, in the presence of the then mayor and sheriffs of London aforesaid, at the Guildhall of the said city, and to correct the error, if any happen to be found in the record and proceedings aforesaid, or in giving of judgment in the said plaint, and to do full and speedy justice therein to the parties aforesaid according to law, and the custom of the said city; and *Sir William Turner*, knt. now mayor of the said city of London, and *John Forth* and *Francis Chaplin*, now sheriffs of the said city, then and there came and returned upon the precept of the said justices to them directed, as upon the said precept is indorsed &c.: whereupon the parties aforesaid being called, the said *William Cole* in his proper person comes and appears, and puts in his place *Robert Rawlins*, his attorney, against the said *Henry Greene*, of and in the plea of the writ of error. And the said *Henry Greene* likewise appears in his proper person, and puts in his place *Thomas Moncke*, his attorney, against the said *William Cole*, of and in the said plea &c. And thereupon the said now mayor and sheriffs of the city of London, having had a respite of forty days allowed them by the said justices, according to the custom of the said city, have a day to have the record and proceedings in the said plaint before the said justices at the Guildhall aforesaid, until the 29th day of January next coming, and the same day is then and there given to the parties aforesaid there &c. At which said 29th day of January, in the said twentieth year of the reign of our said lord the now king of England, come here, to wit, at the Guildhall aforesaid, before the said justices, as well as the said now mayor and sheriffs of the said city, as the said *William Cole* by his said attorney, and the said *Henry Greene* by his attorney aforesaid; and thereupon a further day is given by the said justices to the said *Sir William Turner*, knt. mayor of the city of London, and *John Forth* and *Francis Chaplin*, sheriffs of the said city,

to have the said record and proceedings in the said plaint before the said justices of the Guildhall aforesaid, until Monday the 8th day of February next coming, and the same day is given to the parties aforesaid to be then there &c. At which said Monday, the 8th day of February, in the twenty-first year of the reign of our said lord the now king of England &c. come here, to wit, at the Guildhall aforesaid, before the said justices, as well as the said mayor and sheriffs of the city, as the said *William Cole* by his attorney aforesaid; and thereupon a further day is given by the said justices to the said Sir *William Turner*, knt. mayor of the city of London, *John Forth* and *Francis Chaplin*, sheriffs of the said city, to have the record and proceeding in the said plaint before the said justices at the Guildhall aforesaid, until Tuesday, the 16th day of this instant month of February, in the year last aforesaid, and the same day is given to the parties aforesaid to be then there &c. At which said Tuesday, the 16th day of February, in the said twenty-first year of the reign of our said lord Charles the Second, now king of England &c. come here, to wit, at the Guildhall aforesaid, before the said justices, as well as the said mayor and sheriffs of the said city, as the said *William Cole* by his said attorney, and the said *Henry Greene* by his said attorney; and thereupon the said Sir *William Turner*, knt. mayor of the city of London, and *John Forth* and *Francis Chaplin*, sheriffs of the said city, by Sir *John Howell*, knt. recorder of the said city, certify *ore tenus*, according to the custom of the said city, the said record, whereof mention is made in the precept of the justices to them directed, and to the writ of error and commission annexed, as follows, that is to say: Common Pleas holden in the hustings in the Guildhall of the city of London, according to the custom of the said city, on Monday next, before the Feast of the Conversion of St. Paul, in the eighteenth year of the reign of our lord Charles the Second, by the grace of God, of England, Scotland, France, and Ireland, king, defender of the faith. At this hustings comes here into court *William Cole*, esq. in his proper person, and brings here into court the writ of our said lord the now king, to the mayor and sheriffs of London directed, of waste done to houses in the parish of St. Giles without Cripplegate, London, between the said *William Cole*, plaintiff, and *Henry Greene*, defendant, the tenor of which said writ follows in these words, to wit, Charles the Second, by the grace of God, of England, Scotland, France, and Ireland, king, defender of the faith &c. to the mayor and sheriffs of London, greeting, *William Cole*, esq. hath complained to us, that *Henry Greene* has committed waste, sale and destruction in houses, in the parish of St. Giles without Cripplegate, London, which he holds for a term of years of the said *William*, as assignee of *John Willard*, who demised the same to the said *Henry* for the said term, to the dishonouring of the said

*William*, and against the form of the provision in such case, and therefore we command you, that having heard the complaint of the said *William* in this behalf, and called the said parties before you, and heard their reasons, you cause to be done to the said *William* full and speedy justice, as of right according to the custom of the said city ought to be done, and as hitherto in the like case has been used and accustomed to be done, that we may no more hear his complaint in that behalf. Witness ourselves at Westminster, the 18th day of January, in the eighteenth year of our reign. And thereupon the said *William Cole*, esq. in court here found pledges to prosecute the said writ, to wit, *John Doe* and *Richard Roe*, according to the custom of the said city &c. and then and there in the said court the said *William Cole* put in his place *Robert Rawlins*, his attorney, against the said *Henry Greene* in the plea aforesaid &c. and then and there in the said court, by his said attorney, prayed process to be thereupon made to him against the said *Henry Greene*, according to the custom of the said city &c. and it is granted to him &c. Whereupon in the said court, at the prayer of the said *William*, made by his said attorney, the sheriffs of London were commanded by the court here according to the custom of the said city, that they summon by good summonses the said *Henry Greene*, that he be here in court at the next hustings of Common Pleas of London, to be holden in the Guildhall of the said city, according to the custom of the city &c. to answer the said *William Cole*, in a plea of waste, and that the said sheriffs have then and there the names of the summoners by whom &c. and that precept &c. and the same day is given to the said *William Cole* to be here &c. At which day here at the hustings of Common Pleas of London, holden in the Guildhall of the city of London, according to the custom of the said city, on Monday next after the Feast of the Purification of the Blessed Virgin Mary, in the nineteenth year of the reign of our said lord Charles the Second, now king of England &c. the said *William Cole*, esq. by the said *Robert Rawlins*, his attorney, comes and offers himself here in the court &c. against the said *Henry Greene* in the plea aforesaid &c. and the sheriffs of London, to wit, Sir *Robert Fyner*, knt. and bart. and Sir *Joseph Sheldon*, knt. now certify and return to the court here on the said precept to them directed, that they by virtue of the said precept, by *John Good* and *Richard Rent*, good and lawful men of their bailiwick, summoned the said *Henry Greene*, that he should be here at the said hustings to answer the said *William Cole* in the said plea of waste &c. as by the said precept they were commanded &c. And thereupon afterwards at the same hustings, the said *Henry Greene*, though solemnly called, doth not come, but makes default, whereupon at the said court, at the prayer of the said *William*, made by his said attorney, the sheriffs of London are commanded by the court here, that they



put by sureties and safe pledges the said *Henry Greene*, that he be here in court at the next hustings of Common Pleas of London, to be holden in the Guildhall of the said city, according to the custom of the said city, to answer the said *William Cole* in the said plea of waste, and that the said sheriffs should have then and there the names of those by whom &c. and this precept &c. and the same day is given to the said *William Cole* to be here &c. At which said next hustings of Common Pleas of London, holden in the Guildhall of the city of London, according to the custom of the said city, on Monday next before the Feast of Perpetua and Felicitas, in the nineteenth year of the reign of our said lord Charles the Second, now king of England, the said *William Cole*, by the said *Robert Rawlins*, his attorney, comes and offers himself here in court against the said *Henry Greene* in his plea aforesaid &c.; and the sheriffs of London, to wit, Sir *Robert Vyner*, knt. and bart. and Sir *Joseph Sheldon*, knt. now certify and return to the court here upon the said precept to them directed, that the said *Henry Greene* was attached by pledges, to wit, *John Good* and *Richard Rent*, to be at the said hustings to answer the said *William Cole* in the plea aforesaid, as by the said precept they were commanded &c.; and thereupon at the said hustings the said *Henry Greene*, although solemnly called, doth not come, but makes default, whereupon at that same court, at the prayer of the said *William*, made by his said attorney, the sheriffs of London are commanded by the court here, that they distrain the said *Henry Greene* by all his goods and chattels within the liberty of the said city, that he be here at the hustings of Common Pleas of London, to be holden in the Guildhall of the said city, to answer the said *William Cole* in the said plea of waste, and that the said sheriffs of the said city have then and there the names of those by whom &c. and this precept &c. the same day is given to the said *William Cole* to be here &c. At which day, to wit, at the hustings of Common Pleas of London, holden in the Guildhall of the city of London, according to the custom of the said city, on Monday next before the Feast of Benedict the Abbot, in the said nineteenth year of the reign of our said lord Charles the Second, now king of England &c. the said *William Cole*, by the said *Robert Rawlins*, his attorney, comes and offers himself in court here &c. against the said *Henry Greene* in his plea aforesaid &c.; and the sheriffs of London, to wit, the said Sir *Robert Vyner*, knt. and bart. and Sir *Joseph Sheldon*, knt. now certify and return to the court here upon the said precept to them directed, that the said *Henry Greene* by virtue of the said precept was distrained by his goods and chattels to the value of 10s., so that he should be here at this hustings to answer the said *William Cole* in the said plea of waste, as they were above commanded &c.; and that the said *Henry Greene* was mainprised by *John Good* and *Richard Rent*; and

thereupon afterwards, at the same hustings, the said *Henry Greene* being solemnly called, in his proper person comes and appears to the said writ of the said *William &c.* And thereupon now here at this hustings the said *William Cole* complains of the said *Henry Greene* of a plea, wherefore, whereas it is provided by the common council of the realm of our lord the king of England, that it shall not be lawful for any person to commit waste, sale or destruction in the lands, houses, or gardens, demised to them for the term of life or years, the said *Henry Greene* did make waste, sale and destruction in houses, in the parish of St. Giles without Cripplegate, London, which he (*a*) holds for a term of years of the said *William* as assignee of *John Hilliard*, gent. who demised them to the said *Henry Greene* for the said term, to the disinheriting of the said *William*, and against the form of the provision in such case provided. And whereupon the said *William Cole* by *Robert Rawlins*, his attorney, says, that whereas the said *John Hilliard* was seized of and in a certain messuage with the appurtenances, in the parish of St. Giles without Cripplegate, London, in his demesne as of fee, and held it in free burgage of the city of London, and being so thereof seized, the said *John*, on the 20th day of April, in the year of our Lord 1650, at London aforesaid, in the parish aforesaid, by a certain indenture between him the said *John*, by the name of *John Hilliard*, of Edmonton, in the county of Middlesex, gent. of the one part, and the said *Henry*, by the name of *Henry Greene*, of the parish of St. Giles without Cripplegate, London, brewer, of the other part (one part thereof sealed with the seal of the said *Henry* the said *William* brings here into court, the date whereof is the same day and year aforesaid), demised and to farm let to the said *Henry* the said messuage, with the appurtenances, by the name of all that messuage, tenement or brew-house, with the appurtenances, commonly called or known

Declaration  
in waste.

J. H. was  
seized in fee  
of the premises  
in question.

By indenture  
demised the  
same to de-  
fendant,

(a) The writ of waste must charge the defendant either in the *tenet*, or *tenuit*, as it is called; that is, it must shew whether at the time of the action the defendant still holds the premises, or whether the term under which he held them is expired. Cro. Eliz. 356, *Sacheverel v. Bignole*. But in some cases the writ must be in the *tenet*, though the defendant be not tenant at the time of the action, and that through necessity, because there is no other form of writ. As if tenant for life commit waste, and afterwards grant over his estate, or the lessor enter for a forfeiture, or breach of a condition, the action must still be in the *tenet*. 3 Roll. Ab. 629 (F), pl. 1, 4. 330, pl. 5, 6. But waste against te-

nant for years after the determination of his term, either by effluxion of time, surrender, forfeiture, or breach of a condition, or against tenant *per autre vie* after the death of *cestui qui vit*, must be in the *tenuit*. 3 Roll. Abr. 830, pl. 7, 8, 9. 5 Rep. 12 b, *Saunders's case*.

The declaration must charge the defendant either as lessee, assignee, executor, or administrator, and then only for such voluntary waste as has been committed by them respectively. Co. Ent. 692, 693, 695. So if the defendant is tenant by devise, he must be so charged in the declaration. 3 Roll. Abr. 831, pl. 5. Hunt. 110. Cook v. Cook, Co. Ent. 700 b.

to hold for  
fifty-one years,

who entered,  
and was pro-  
cessed.

J. H. devised  
the reversion  
to his son J. H.  
for life, re-  
mainder to his  
first and other  
sons in tail,  
remainder to  
his daughters  
in tail, remain-  
der to plaintiffs  
in fee,

by the name or sign of the "Flower de Lant" shute, lying and being in Goring Lane. in the parish of St. Giles without Cripplegate, London. together with all houses, edifices, buildings, walls, gardens, ways, waters, water-courses, lights, easements, profits, commodities, and improvements whatsoever, with their and every other appurtenances to the said messuage, tenement, brew-house and premises belonging, or in anywise appertaining, or at any time before then must, occupied, or enjoyed with the same, and also together with all and singular parts, parts, utensils, vessels, brewing utensils, implements and necessary things remaining and being within or about the said messuage, tenement or brew-house, contained and specified in a schedule annexed to the said indenture: To have and to hold all and singular the said messuage, tenement or brew-house, and all and singular the other premises demised by the said indenture, with their and every of their appurtenances, to the said Henry Greene, his executors, administrators and assigns, from the Feast of St. John the Baptist next following the date of the said indenture, to the full end and term of fifty-one years thence next following and fully to be complete and ended, as by the said indenture among other things) more fully appears: by virtue of which said demise, the said Henry afterwards, on the Morrow of the Nativity of St. John the Baptist, in the said year of our Lord 1630, entered into the said messuage with the appurtenances, and was and yet is thereof possessed, and the said John was seized of the reversion of the said messuage with the appurtenances in his demesne as of fee; and the said John being so seized thereof, he the said John afterwards, to wit, on the 1st day of December, in the year of our Lord 1651, at London aforesaid, in the parish aforesaid, made his last will and testament in writing, and thereby devised and bequeathed (among other things) the said reversion of the said messuage with the appurtenances to John Hilliard, the only son of the said John Hilliard the testator, for and during the term of his natural life, and after the decease of the said John Hilliard the son, then to the use of the first son of the body of the said John Hilliard the son lawfully to be begotten, and the heirs of the body of such son lawfully to be begotten; and for default of such issue, then to the use of the second son of the body of the said John Hilliard the son lawfully to be begotten, and the heirs of the body of such second son lawfully to be begotten; and for default of such issue then to the use of the third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, and every other son of the body of the said John Hilliard the son, successively one after the other, as they should be in seniority of birth and priority of age respectively, and the respective heirs of the body of every such son and sons lawfully to be begotten, the elder of such sons and sons, and the heirs of his body lawfully to be begotten, always to be preferred before the younger and the heirs of his

body; and for default of such issue then to the use of all and every the daughter and daughters of the body of the said *John* the son lawfully to be begotten, and the heirs of their bodies lawfully begotten; and for default of such issue then the said *John Hilliard* the father, by his said last will, gave and devised the said reversion with the appurtenances to the said *William*, his heirs and assigns for ever <sup>(a)</sup>: and afterwards, to wit, on the 3d day of February, in the said year of our Lord 1651, the said *John Hilliard* the father, at London aforesaid, in the parish aforesaid, died seised of such his estate of and in the said reversion of the said messuage with appurtenances in his demesne as of freehold for the term of his life, the remainder thereof, after the death of the said *John Hilliard* the son, belonging as above in form aforesaid limited; and the said *John Hilliard* the son being so seised thereof, the remainder thereof as aforesaid belonging, the said *John Hilliard* the son, afterwards, to wit, on the 6th day of January, in the year of our Lord 1658, at London aforesaid, in the parish aforesaid, died seised of such his estate therein, without any issue of his body begotten; after whose death he the said *William* was and yet is seised of the said reversion of the said messuage with the appurtenances in his demesne as of fee by virtue of the said last will and testament; and the said *William* being so seised thereof, and the said *Henry* did make waste, sale <sup>(b)</sup>

and died.

J. H. the son  
died without  
issue,and plaintiff  
became seised  
of the rever-  
sion.

(a) The declaration in waste must shew how the sheriff is entitled to the inheritance, *Hob. 84, Skent v. Oxenbridge*; and therefore if the plaintiff declares upon a lease made by himself, the declaration must allege a seisin in fee, or in tail, in him, and a demise to the defendant, *Yelv. 140, Ewer v. Moile*; if upon a lease made by his ancestor, it must state a seisin in fee in the ancestor, or demise by him to the defendant, and a descent to the plaintiff. *Co. Ent. 708 b.* If the plaintiff claims as assignee of the reversion, he must shew his title to it, by grant or devise, as is done in this entry. 2 *Roll. Abr. 831, pl. 1, 2, 3, 4. Co. Ent. 692, 693. Winch. Ent. 1164. edit. 1680. 2 Lutw. 1543, Leigh v. Leigh*; if by fine, the declaration must state the fine and the uses of it. *Co. Ent. 700, 701. Clift, 819, pl. 5*; if by common recovery, it must set forth the recovery and the uses thereof. *Winch. Ent. 1130. 2 Lutw. 1541, Leigh v. Leigh. Clift, 814, pl. 3.* If the plaintiffs sue as parceners, or joint-tenants, the declaration must allege them to be such, *Winch. Ent. 1163*; if the plaintiff sues as rector &c. in right of his church, he must shew that he is so. *Ibid. 1161.* If husband and wife in right of the

wife, bring the action, the declaration must state the reversion to be in both, namely, "that they are seised of the said reversion of their demesne as of fee in right of the wife." *Hob. 1, 2, Earl of Clanrickard v. Sidney.* It was indeed held by two judges against the opinion of the other two, that the words "to the disinheriting," do, after verdict, cure the want of stating the quantity of estate which the plaintiff was seised of, the declaration only alleging that the plaintiff was seised, without shewing what he was seised of, *Cro. Ells. 57, Aston v. Whitenall*; but this seems very questionable. It is not necessary for the plaintiff to name himself assignee in the declaration; if he sets out his title specially as such it is sufficient. 2 *Roll. Abr. 831, pl. 4.* And it is held, that though the writ is general, "whose heir he is," which *prima facie* implies a descent in fee, yet it is no variance to state, in the declaration, a special inheritance in tail. 1 *Leon. 48, Lowknor v. Ford.*

(b) The declaration must particularly specify the quality and quantity of the waste done; though to maintain the action the plaintiff is not bound to prove the whole waste as laid, but

Defendant  
committed  
waste.

and destruction in the said house and messuage, that is to say, by prostrating a brew-house, parcel of the said messuage, of the price of 1000*l.*, and taking away and selling the timber and roof thereof; and also by pulling down, pulling off, and carrying away four ale-tuns fixed to the said brew-house, each of them of the price of 5*l.*, six brewing vessels called coolers, made of timber, likewise fixed to the said brew-house, each of them of the price of 6*l.*, a malt-mill, with a small millstone belonging to the said mill, fixed in the ground in the said brew-house, of the price of 20*l.*, and a cistern made of a cement called plaister of Paris, and fixed in the ground in the said brew-house, of the price of 10*l.*, to the disinheriting (a) of the said *William*, and against the form of the provision in such case provided; wherefore he says that he is injured, and has damage to the value of 1000*l.*, and therefore he brings suit &c.

Defendant  
imparis.

Whereupon the said *Henry Greene* now in the said court puts in his place *Thomas Moncke*, his attorney against the said *William Cole*, in the same plea &c., and the said *Henry Greene* now defendant by his said attorney defends the wrong and injury when &c., and prays leave to imparl thereto in the plea aforesaid to the next hustings of Common Pleas of London to be holden in the Guildhall of the said city, according to the custom of the said city &c., and it is granted to him &c., and the same day is given by the court here to the said *William Cole* in the said plea here &c. At which day, to wit, at the hustings of Common Pleas of London, holden in the Guildhall of the city of London, according to the custom of the said city, on Monday next after the feast of St. Tibercius and Valerianus, in the 19th year of the reign of our said lord Charles the Second, now king of England &c. come and appear as well the said *William Cole* by the said *Robert Rawlins* his attorney, as the said *Henry Greene* by the said *Thomas Moncke* &c. and thereupon the said *Henry Greene*, by his said attorney, now demands further leave to imparl thereto in the plea aforesaid to the next hustings of Common Pleas of London, to be holden in the Guildhall of the said city, ac-

Further im-  
pariance.

shall recover *pro tanto*; therefore where the waste complained of is in cutting trees, and the felling of each tree would of itself be waste, it seems the declaration must shew the number of the trees. 2 Roll. Abr. 632, pl. 1. But where the action is brought for waste in trees, where the cutting of each particular tree would not of itself be waste, but the quantity cut makes it so, the declaration must say so many loads. Ibid. pl. 2. So if waste is as-

signed in houses, the declaration must shew the particular defects.

(a) The declaration must state it to be "to the disinheriting" of the plaintiff. Co. Lit. 295 a; but if husband and wife, seized in fee in right of the wife, bring waste, it must be laid to be "to the disinheriting of the wife," for it is her inheritance that is damaged by the waste; and if it is alleged to be to the disinheriting of husband and wife, the writ shall abate. 2 Roll. Abr. 632, pl. 3.

cording to the custom of the said city &c., and it is granted to him &c., and the same day is given by the court here to the said *William Cole* in the plea aforesaid here &c. At which said next hustings of Common Pleas of London, holden in the Guildhall of the said city, on Monday next after the feast of the Apostles Philip and Jacob, in the said 19th year of the reign of our said lord Charles the Second, now king of England &c., come and appear here as well the said *William Cole* by the said *Robert Rawlins* his attorney, as the said *Henry Greene* by the said *Thomas Moncke* his attorney &c., and thereupon the said *Henry*, by his said attorney, now prays further leave to imparl thereto in the plea aforesaid, to the next hustings of Common Pleas of London, to be holden here in the Guildhall of the said city, according to the custom of the said city &c., and the same day is given by the court here to the said *William Cole* in the plea aforesaid here &c. At which day, to wit, at the hustings of Common Pleas of London, holden in the Guildhall of the city of London, according to the custom of the said city, on Monday next before the feast of St. Barnabas the Apostle, in the said 19th year of the reign of our said lord Charles the Second, now king of England &c. come and appear here as well the said *William Cole* by the said *Robert Rawlins* his attorney, as the said *Henry Greene* by the said *Thomas Moncke* his attorney, now prays further leave to imparl thereto in the plea aforesaid to the next hustings of Common Pleas of London, to be holden in the Guildhall of the said city, according to the custom of the said city &c., and it is granted to him &c., and the same day is given by the said court to the said *William Cole* to be here &c. At which day, to wit, at the hustings of Common Pleas of London, holden in the Guildhall of the said city, on Monday next before the feast of the Apostles Peter and Paul, in the said 19th year of the reign of our said lord Charles the Second, now king of England &c., come and appear here as well the said *William Cole* by the said *Robert Rawlins* his attorney, as the said *Henry Greene* by the said *Thomas Moncke* his attorney, and thereupon the said *Henry*, by his said attorney, now prays further leave to imparl thereto in the plea aforesaid to the next hustings of Common Pleas of London, to be holden in the Guildhall of the said city, according to the custom of the said city &c., and it is granted him &c., and the same day is given by the said court to the said *William Cole* to be here &c. At which day, to wit, at the hustings of Common Pleas of London, holden in the Guildhall of the city of London, according to the custom of the said city, on Monday next before the feast of St. Benedict the Abbot, in the said 19th year of the reign of our said lord Charles the Second, now king of England &c. come and appear here as well the said *William Cole* by the said *Robert Rawlins* his attorney, as the said *Henry Greene* by the said *Thomas Moncke* his attorney

The like.

The like.

The like.

and thereupon the said *Henry Greene* by the said *Thomas Moncke* his attorney, comes here and defends the wrong and injury when &c., and says that the said plaintiff ought not to have or maintain his said action against him, because he says that he the said defendant, in the parish mentioned in the writ and declaration, did not make any waste (a), sale and destruction, in manner and form as the said plaintiff, by his said writ and declaration, has above supposed; and this he is ready to verify; wherefore he prays judgment if the said *William* ought to have his said action against him &c.

Whereupon a day is given by the said court here as well to the said *William Cole* as to the said *Henry Greene* in the plea aforesaid, to be here in court at the next hustings of Common Pleas of London, to be holden in the Guildhall of the said city, according to the custom of the said city. At which said hustings of Common Pleas of London, holden in the Guildhall of the said city, according to the custom of the said city, on Monday next before the feast of St. James the Apostle, in the said 19th year of the reign of our said lord Charles the Second, now king of England &c., come and appear here as well the said *William Cole* by the said *Robert*

(a) This is the general issue in waste. Co. Ent. 700 a. 708 a. 2 Lutw. 1545. And it should seem that the plea in the principal case ought to have concluded to the country, and not with a verification. The plea of *nil waste* admits nothing, but puts the whole declaration in issue, and therefore the plaintiff must prove his title as laid in the declaration, and also the kind of waste stated in it; so that if the waste alleged in the declaration be in cutting trees, and the jury find that the defendant stubbed them, it will be a variance. 2 Lutw. 1547, Leigh v. Leigh. Upon this plea the defendant may give in evidence any thing that proves it to be no waste, as that it happened by tempest, lightning, enemies, or the like. Co. Litt. 283 a; or that the lessor himself committed the waste. 5 H. 4. 2 b. But it is no plea, where the defendant has matter of justification, or excuse; therefore where the defendant cut timber for repairs, and used it accordingly, or for necessary botes, such as for fuel, cart-bote, hedge-bote, or plow-bote &c., he must plead these matters specially, and cannot give them in evidence on the general issue of *nil waste*. Co. Litt. 283 a. Co. Ent. 703 a. Winch Ent. 1144, 1146, 1169, 1182. 2 Lutw. 1546, Leigh v. Leigh. But

it is not enough to say that the defendant took timber &c. for repairs, without adding likewise that he used, or at least keeps it for repairs; for though he might at first have taken it for that purpose, yet perhaps he afterwards sold it. 3 Lev. 313, Danby v. Hodgson; or the defendant may plead *nil waste* to part, and a justification to the rest. So if the lease to the defendant was without impeachment of waste. 2 Roll. Abr. 835, pl. 13, 14. Co. Ent. 694, a. b. S. C.; or if the trees are excepted out of the lease. 8 East, 190, Goodwright v. Vivian. See 1 Saund. 322 a. note (5); or if the defendant has repaired before the action, for the jury must view the place wasted. 5 Rep. 119 b. Whelpdale's Case. 2 Inst. 306, 307; or if the plaintiff gave the defendant leave to cut the trees; or if the premises were in so ruinous a state at the commencement of the lease that the defendant could not repair them. Moor, 54, Ward v. Dettensam. Winch Ent. 1159. These are matters of justification and excuse, which must be pleaded specially, and cannot be given in evidence on the general issue of *nil waste*. But if the tenant repairs after the action brought, he cannot plead it in bar of the action. 2 Inst. 307.



*Rawlins* his attorney, as the said *Henry Greene* by the said *Thomas Moncke* his attorney; and thereupon at the same court so as aforesaid holden, the said *William* says that he, by any thing before alleged, ought not to be barred from having his said action, because he says that the said *Henry*, in the parish of St. Giles without Cripplegate, London, did make waste, sale and destruction, as the said *William* above complains against him, and this he prays may be inquired of by the country &c. and the said *Henry* likewise &c. Whereupon a further day is given by the said court here to the said parties in the plea aforesaid to be here in court at the next hustings of Common Pleas of London, to be holden in the Guildhall of the said city, according to the custom of the said city. At which said next hustings of Common Pleas of London, holden in the Guildhall of the said city, according to the custom of the said city, on Monday next before the feast of St. Michael the Archangel, in the said 19th year of the reign of our said lord Charles the Second, now king of England, come and appear here as well the said *William Cole* by the said *Robert Rawlins* his attorney, as the said *Henry Greene* by the said *Thomas Moncke* his attorney, and thereupon at the same court so as aforesaid holden according to the custom of the said city, the beadle of the ward of Cripplegate Without, the beadle of the ward of Aldersgate, the beadle of the ward of Farringdon Without, and the beadle of the ward of Bishopsgate, being the four wards next adjoining to the said houses, are commanded by the said court here, that each of them the said beadles should separately return and summon six good and lawful men of each of the said wards, to be here in court at the next hustings of Common Pleas of London, to be holden in the Guildhall of the said city, according to the custom of the said city &c., and who neither &c., to recognize &c., and to try the said issue joined between the said parties in the plea aforesaid, according to the custom of the said city &c. At which day, to wit, at the hustings of Common Pleas of London, holden in the Guildhall of the said city, according to the custom of the said city, on Monday next before the feast of St. Luke the Evangelist, in the 19th year of the reign of our said lord Charles the Second, now king of England &c., come and appear here in court, as well the said *William Cole* by the said *Robert Rawlins* his attorney, as the said *Henry Greene* by the said *Thomas Moncke* his attorney, and thereupon at the same hustings each of the said beadles of the said four wards returns and certifies to the said court the names of six good and lawful men of every ward of the said wards by them separately summoned, to be here at this day, and who neither &c., to recognize &c., to try the issue aforesaid joined between the parties aforesaid in the plea aforesaid; to wit, *Edward Bono*, beadle of the said ward of Cripplegate Without, returns and certifies to the said court



the names of *W. E., J. J., T. W., D. W., G. H., and J. M.; Edward Bedford*, beadle of the said ward of Aldersgate, returns and certifies to the said court the names of *J. M., G. T., R. P., T. C., S. W., and E. C.; Samuel Jackson*, beadle of the said ward of Farringdon Without, returns and certifies to the said court the names of *R. B., T. S., R. D., H. T., M. M., and J. W.*; and *Henry Coleman*, beadle of the said ward of Bishopsgate, returns and certifies to the said court the names of *R. S., T. F., T. A., T. L., J. A., and T. M.*; and because none of the said jury come, therefore the jury is by the said court here put in respite here until the next hustings of Common Pleas of London, to be holden in the Guildhall of the said city, and the same day is given to the parties aforesaid, in the plea aforesaid, to be here &c. At which day, to wit, at the hustings of Common Pleas of London, holden in the Guildhall of the said city, according to the custom of the said city, on Monday next before the Feast of All Saints, in the 19th year of the reign of our said lord Charles the Second, now king of England &c. come and appear here, as well the said *William Cole* by the said *Robert Rawlins*, his attorney, as the said *Henry* by the said *Thomas Moncke*, his attorney; and thereupon at the said last-mentioned hustings, at the prayer of the said *William Cole*, made to the court by his said attorney, the sheriffs of London are commanded by the said court here according to the custom of the said city, that they distrain the said twenty-four good and lawful men of the said before-named wards by their lands and chattels &c. so that they be at the next hustings of Common Pleas of London, to be holden in the Guildhall of the said city, according to the custom of the said city &c. to make a jury &c. to try the said issue as aforesaid joined between the said parties in the plea aforesaid &c. so that the said jury may not remain to be taken for default of jurors, and let the said jury in the mean time have a view of the said houses wasted, and that the said sheriffs have then here this precept &c. and the same day is given by the court here to the parties aforesaid in said plea to be here &c. At which day, to wit, at the hustings of Common Pleas of London, holden in the Guildhall of the said city, according to the custom of the said city, on Monday next after the Feast of St. Leonard the Abbot, in the said 19th year of the reign of our said lord Charles the Second, now king of England &c. come here, as well the said *William Cole* by the said *Robert Rawlins*, his attorney, as the said *Henry Greene* by the said *Thomas Moncke*, his attorney, and the now sheriffs of London, that is to say, Sir *Thomas Daryea*, knt. and Sir *Dennis Gordon*, knt. now certify and return to the court here upon the said last precept, that they by virtue of the said precept did distrain the said twenty-four good and lawful men by all their lands and chattels, so that they should be here at this hustings to make a jury &c. to try &c. as they

were above commanded &c.; and that each of the said twenty-four good and lawful men by himself is mainprized by *Thomas Twels* and *Richard Serjeant*, and return the issues of each of the said jurors by himself to 10s.; whereupon at the prayer of the said *Robert Rawlins*, his said attorney, the said twenty-four good and lawful men of the said city, being then here solemnly called, twelve of them, to wit, *J. J.*, *S. W.*, *D. W.*, *G. T.*, *R. P.*, *T. C.*, *S. W.*, *E. C.*, *R. D.*, *H. T.*, *J. W.*, and *R. S.*, likewise come and appear here, who being then and there chosen, tried and sworn, to speak the truth of the premises, say, upon their oath, that the said *Henry Greene* did make waste, sale and destruction in the houses of the said messuage, that is to say, by prostrating a brew-house, parcel of the said messuage, to the value of 100*l.*; and also by pulling down, pulling off, and carrying away four ale-tuns fixed to the said brew-house, of the price of 10*l.*; and six brewing vessels called coolers, made of timber, likewise fixed to the brew-house, each of them of the price of 33*s.* 4*d.* in manner and form as the said *William Cole* has by his said declaration supposed; and as to the residue of the said waste above supposed to be done, the jurors aforesaid, upon their oath aforesaid, further say, that the said *Henry Greene* made no waste, sale or destruction therein, as the said *Henry* as above thereof in pleading alleged; and they assess the costs and charges of the said *William Cole* by him about his suit in this behalf expended to 12*d.* Whereupon at the hustings last aforesaid, because the court here would advise what judgment to give of and upon the premises before they give their judgment, a day is given by the said court to the said parties to the next hustings of Common Pleas of London, to be holden in the Guildhall of the said city, according to the custom of the said city, to hear their judgment thereon, for that the court here is thereof not yet advised &c. At which day, to wit, at the hustings of Common Pleas of London, holden in the Guildhall of the city of London, according to the custom of the said city, on Monday next after the Feast of St. Edward the King, in the said 19th year of the reign of our said lord Charles the Second, now king of England &c. come and appear here, as well the said *William Cole* by the said *Robert Rawlins*, his attorney, as the said *Henry Greene* by the said *Thomas Moncke*, his attorney, and at the hustings last aforesaid the said *William Cole*, by his said attorney, prays judgment against the said *Henry Greene* in and upon the said verdict by the jurors aforesaid in form aforesaid given, according to the custom of the said city; whereupon at the said hustings last aforesaid the said *Henry Greene*, by his said attorney, prays that judgment against the said *Henry Greene* in and upon the said verdict by the jurors in form aforesaid given, shall be arrested on account of the insufficiency of the said verdict, and that the said issue shall

Verdict for plaintiff as to part, and for defendant as to the residue.

Motion that judgment should be arrested, and a new trial granted.

*Curia adversariis  
vult.*

*Ullterius adver-  
sare.*

*Ullterius adver-  
sare.*

Judgment  
reversed.

thereof not yet advised &c. At which said Friday the 14th of May, in the said 21st year of the reign of our said lord Charles the Second, now king of England &c., come here, to wit, at the Guildhall aforesaid, before the said justices, as well the said *William Cole* by his said attorney, as the said *Henry Greene* by his said attorney, and thereupon, because the said justices will further advise what judgment to give upon the premises before they give their judgment thereon, a day is given by the said justices here to the said parties, to be here before the said justices at Guildhall aforesaid, on Thursday the 27th day of May next following, to hear their judgment thereon, for that the said justices here are thereof not yet advised &c. At which Thursday, the 27th day of May, in the said 21st year of the reign of our said lord Charles the Second, now king of England &c. come here, to wit, at the Guildhall aforesaid, before the said justices, as well the said *William Cole* by his said attorney, as the said *Henry Greene* by his said attorney, and thereupon, because the said justices will further advise what judgment to give upon the premises before they give judgment thereon, a further day is given by the justices to the said parties to be here before the said justices here at the Guildhall aforesaid, on Monday the 14th day of June next coming, to hear their judgment thereon, for that the said justices here are thereof not yet advised &c. At which said Monday, the 14th day of June, in the said 21st year of the reign of our said lord Charles the Second, now king of England &c. come here, to wit, at the Guildhall aforesaid, before the said justices, as well the said *William Cole* by his said attorney, as the said *Henry Greene* by his said attorney, and thereupon, because the said justices (the like continuances by *curia adversariis vult* to five other days). At which said Wednesday, the 1st day of December, in the said 21st year of the reign of our said lord Charles the Second, now king of England &c. come here, to wit, at the Guildhall aforesaid, before the said justices, as well the said *William Cole* by his said attorney, as the said *Henry Greene* by his said attorney, and thereupon the premises being seen, and by the justices more fully understood, and mature deliberation being thereupon had, it seems to the said justices here that the said first verdict was not, nor is, bad or erroneous, nor ought the said verdict to have been quashed, or any new trial had in the said cause, but judgment ought to have been given upon that verdict for the said *William* against the said *Henry*: therefore, no regard being had to the said 12d. assessed for costs and charges, for that costs and charges are not allowed in such case, and because the said *William* freely here in court remits those costs and charges to the said *Henry*, it is considered by the court here that the whole proceedings had and made in the said cause for the said second trial after the said first verdict, and also the said second verdict and the judgment given as

Valentine, bishop and martyr, in the 20th year of the reign of our said lord Charles the Second, now king of England &c. come and appear here, as well the said *William Cole* by the said *Robert Rawlins*, his attorney, as the said *Henry Greene* by the said *Thomas Moncke*, his attorney, and at the hustings last aforesaid the said *William Cole*, by his said attorney, prays judgment against the said *Henry Greene* in and upon the said verdict by the jurors aforesaid, in form aforesaid given, according to the custom of the said city; whereupon at the hustings last aforesaid, because it appears to this court that the said verdict, in this behalf given, ought to be quashed as bad and erroneous, and that a new trial of the said issue ought to be had between the said parties, therefore the said verdict is quashed by the judgment of the said court; and it is granted by the said court that there be a new return of the beadles, and a new precept of *distringas juratores* to try the said issue anew, and a day is given by the said court to the said parties to the next hustings of Common Pleas of London, to be holden in the Guildhall of the said city, according to the custom of the said city &c. At which day, to wit, at the hustings of Common Pleas of London, holden in the Guildhall of the said city, according to the custom of the said city, on Monday next before the Feast of St. Perpetua and Felicitas, in the said 20th year of the reign of our said lord Charles the Second, now king of England &c. come and appear here, as well the said *William Cole* by the said *Robert Rawlins*, his attorney, as the said *Henry Greene* by the said *Thomas Moncke*, his attorney; whereupon at the hustings last aforesaid, a further day is given by the said court to the said parties, until the next hustings of Common Pleas of London, to be holden in the Guildhall of the said city, according to the custom of the said city. At which day, to wit, at the hustings of Common Pleas of London, holden in the Guildhall of the said city, according to the custom of the said city, on Monday next after the Feast of the Annunciation of the Blessed Virgin Mary, in the said 20th year of the reign of our said lord Charles the Second, now king of England &c. come and appear here, as well the said *William Cole* by the said *Robert Rawlins*, his attorney, as the said *Henry Greene* by the said *Thomas Moncke*, his attorney; whereupon at the hustings last aforesaid, at the prayer of the said *Henry Greene*, it is commanded to the beadles of four wards of the said city, to wit, to the beadle of the ward of Cripplegate Without, the beadle of the ward of Aldersgate, the beadle of the ward of Bassishaw, and the beadle of the ward of Coleman Street, that of every of them should separately return and summon six good and lawful men of each ward of the said wards, according to the custom of the said city, to be here in court at the next hustings of Common Pleas of London, to be holden in the Guildhall of the said city, according to the custom of the said city &c., and

Verdict set aside, and a new trial granted.

Another precept to the beadles of four wards to summon a jury.

ancient custom of the said city, the trial in such case ought to be by a jury returned from the four next wards next adjoining to the places wasted or supposed to be wasted, or otherwise such trial is not valid or sufficient according to the said custom. And the said *Henry Greene* in fact says, that the said four wards of Cripplegate Without, Aldersgate, Farringdon Without, and Bishopsgate, were not the four wards next adjoining to the said houses above supposed to be wasted, but the said four wards of Cripplegate Without, Aldersgate, Bassishaw, and Coleman Street, were the four wards next adjoining to the said houses above supposed to be wasted, in which case the said trial had by the jury from the said wards of Cripplegate Without, Aldersgate, Farringdon Without, and Bishopsgate, not being according to the custom of the said city, is void and of no effect in law, and no judgment ought to have been given thereon for the said *William Cole* against the said *Henry Greene*, and therefore in that there is manifest error; and this the said *Henry Greene* is ready to verify, wherefore he prays judgment, and that the said judgment given by the said Sir *John Vaughan*, Sir *Matthew Hale*, Sir *Christopher Turner*, Sir *Richard Rainsford*, and Sir *William Moreton*, the commissioners aforesaid for the said *William Cole* against the said *Henry Greene* may be reversed, annulled, and altogether held for nothing, and that he the said *Henry Greene* may be restored to all things which he has lost by occasion of the said judgment &c.

S. C. 1 Lev.  
209. See  
1 Mod. 94, 95.

In waste stating that the defendant did make waste, sale and destruction, if the jury do not find any sale, it is not material, if they find particular wastes. If the jury give costs of suit, there being none recoverable in the action, yet judgment may be entered for the plaintiff, *nullo habitu respectu*, to the costs.

#### COLE v. GREENE.

Error in parliament brought by *Henry Greene* against *William Cole*, a barrister of Gray's Inn, on a judgment given by special commissioners in London, to examine and correct a judgment given in the hustings before the mayor and sheriff, between the said *Cole*, plaintiff, and the said *Greene*, defendant, in an action of waste (a); in which the plaintiff *Cole* had de-

(a) This action can only be brought by him who has the immediate reversion, or remainder in fee or in tail, to the disinheritor of whom the waste is always alleged to have been committed, Co. Litt. 53 a.; and therefore if a lease be made to A. for life or years, remainder to B. for life, and A. commit waste, the action cannot be brought by him in the remainder, or reversion in fee, or in tail, so long as the estate of B. continues, Co. Litt. 54 a. All. 81, Udal v. Udal. 2 Roll. Abr. 829. Cro. Jac. 688, Bray v. Tracey; but if B. should afterwards die,

or surrender his estate, the reversioner or remainder-man may bring an action against A. for the waste so done by him; for by the death or surrender of B. the impediment is removed. Moor. 387. 5 Rep. 76 b. Paget's case. Sir W. Jones, 51, Bray v. Tracey. So if a lease for life be made, remainder for years, the reversioner or remainder-man may bring the action, notwithstanding the mesne remainder. Co. Litt. 54 a. 2 Inst. 301. It is held, that tenant in tail after possibility cannot have the action, for in effect he is only tenant for life. 2 Roll. Abr. 825,

clared, that one *Hilliard* was seised in fee of a messuage with the appurtenances (which in truth was a great brew-house),

pl. 5. Co. Litt. 53 b. Nor can any person maintain this action, unless he had an estate of inheritance in him *at the time when the waste was committed*; and therefore it does not lie by an heir for waste done in the time of his ancestor. 2 Inst. 305. Nor by the grantee of a reversion for waste committed before the grant to him.

With respect to the person against whom this action may be brought, it seems clear that at common law it only lay against tenant by the curtesy, tenant in dower, or guardian; for as these estates were created by law, it took care to prevent any waste being committed by them, by giving the reversioner in fee an action of waste to punish them for an act so injurious to the inheritance; but if tenant for life or years committed waste, the law gave the reversioner no action of waste, because as their estates were created by grant, the grantors might have secured themselves from waste, by inserting in the grant a special provision against it. 2 Inst. 300. But now by the statute of Gloucester (6 Edw. 1. c. 5.) this action is given against lessee for life, or years, or tenant *per autre vie*, 2 Inst. 301; or against the assignee of tenant for life or years, for waste done after the assignment. Cro. Eliz. 683, *Sanders v. Norwood*. But it does not lie against an executor for waste committed by his testator, it being a tort which dies with the person. 2 Inst. 302. 2 Roll. Abr. 828, pl. 7.

But this action is now very seldom brought, and has given way to a much more expeditious and easy remedy by an action on the case in the nature of waste. The plaintiff derives the same benefit from it, as from an action of waste in the *tenuit*, where the term is expired, and he has got possession of his estate, and consequently can only recover damages for the waste; and though the plaintiff cannot in an action on the case recover the place wasted, where the tenant is still in possession, as he may do in an action of waste in the *tenet*, yet this latter action was found by experience to be so imperfect and defective a mode of recovering seisin of the place wasted, that the plaintiff obtained little or no advantage from it; and therefore where the demise was by deed, care was

taken to give the lessor a power of re-entry, in case the lessee committed any waste or destruction; and an action on the case was then found to be much better adapted to the recovery of mere damages than an action of waste in the *tenuit*. It has also this farther advantage over an action of waste, that it may be brought by him in the reversion or remainder for life or years, as well as in fee, or in tail; and the plaintiff is entitled to costs in this action, which he cannot have in an action of waste. However, this action on the case prevailed at first with some difficulty. Thus, where a remainder-man in fee of a copyhold estate brought an action on the case in the nature of waste against tenant for life for waste done in the dwelling-house, the defendant demurred generally to the declaration, and in support of the demurrer it was objected, first, that an action on the case did not lie; for Lord Coke on the statute of Gloucester says, that at common law the reversioner had not any remedy for waste committed by the termor, it being his own folly that he had not taken security against it by covenant; and secondly, that the jury could not tell what damages to give, for it was uncertain how long the tenant for life would live, and the house might be repaired by him in his life-time. And of that opinion were *Windham* and *Charlton*, justices, strongly; but *Pemberton*, C. J. and *Levinz*, were of a contrary opinion. And, as to the first objection, they said that Lord Coke was to be understood according to the subject-matter of which he is speaking, namely, that there was no remedy by an action of waste. And *Pemberton* said that a lessor might without doubt at this day waive his remedy by action of waste, and bring an action on the case against his lessee for waste; and cited Cro. Eliz. 461, *Jeremy v. Lowgar*; where husband, seised in fee in right of his wife, made a lease for years, lessee burnt the house, the husband brought an action on the case, and by the two judges then in court, it was held, that it lay, notwithstanding the objection that waste did not lie in such case at the common law, because he might have secured himself by covenant. And as to the second objection, *Pemberton* and *Levinz* said

in the parish of St. Giles without Cripplegate, London, and, being so seised, demised the said messuage with the appurtenances

it would be unreasonable to compel him to wait until the death of tenant for life to see if he would repair, for perhaps in the mean time either the plaintiff or defendant might die, and then the action founded on a tort would die with the person; or the reversioner might wish to dispose of the reversion, which, by reason of the waste committed by the tenant for life, would not sell for so much money as it would do if the house were in proper repair. 3 Lev. 130, *Jefferson v. Jefferson*. 4 Barr. 2141, *Jenier v. Gifford*.

But now it is become the usual action as well for permissive as voluntary waste. And where the lessee even covenants not to do waste, the lessor has his election to bring either an action on the case, or of covenant, against the lessee, for waste done by him during the term. As where a lease was made for twenty-one years, in which the lessee covenanted to yield up the premises repaired at the end of the term; the lessee during the term committed waste, and at the expiration thereof delivered up the premises to the lessor in a ruinous condition. Afterwards the lessor brought an action on the case against the tenant for the waste committed by him during the term; and it being objected at the trial that the plaintiff ought to have brought an action of covenant, and not on the case, a verdict was found for the plaintiff subject to that point; but the court of Common Pleas was clearly of opinion, that an action on the case was maintainable, as well as covenant; and by *De Grey, C. J.*, "Tenant for years commits waste, and delivers up the place wasted to the landlord: had there been no deed of covenant, an action of waste, or case in the nature of waste, would have lain. Because the landlord by the special covenant acquires a new remedy, does he therefore lose his old?" 2 Black. Rep. 1111, *Kenlyside v. Thornton*.

In an action on the case in the nature of waste brought by a landlord, whether the immediate lessor or his heir or assignee, against his tenant, whether lessee or his assignee, it does not appear to be necessary, as in an action of waste, to set out the title either of the plaintiff or the defendant in the declaration; but it seems suffi-

cient to state their relation to each other in a form somewhat similar to this: "That whereas the said (defendant) on, &c. in the year of our Lord, &c. and before and from thence until and at the time of committing the grievance in this count mentioned, was and still is possessed of and in a certain, &c., with the appurtenances, lying and being at, &c. in the said county, and during all that time held and occupied the same as tenant thereof to the said (plaintiff) to whom the reversion thereof during all the time aforesaid belonged, under a certain demise theretofore made to the said (defendant) at and under a certain rent therefore payable by the said (defendant) to the said (plaintiff): yet the said (defendant) contriving &c." But where an estate is given to A. for life, remainder to B. in fee, or in tail, and A. is guilty of waste either voluntary or permissive, it seems necessary to set forth in the declaration the quantity of estate which A. is seised of, though not the quantity of estate which the plaintiff has in the reversion, for that is matter of evidence only; and in that case, the form of the declaration may be somewhat in this way: "That whereas the said (defendant) on &c. in the year of our Lord &c., and before, and from thence until and at the time of committing the grievance in this count mentioned, was and still is seised of and in a certain &c. with the appurtenances, lying and being at &c. in the said county in his demesne as of freehold, the reversion (or remainder) thereof during all the time aforesaid belonging to the said (plaintiff): yet &c." And it seems better not to state the estate which the plaintiff has in the remainder or reversion; for if he does state it, and mistakes it, the variance will be fatal. As where, in an action on the case in the nature of waste, the declaration set forth that the defendant was tenant for life, the remainder thereof during all the time aforesaid belonging to the plaintiff in tail, to wit, to him and the heirs of his body; but on reading the deed by which the plaintiff and defendant's estates were created, it appeared, that the plaintiff was entitled to the remainder in tail-male, and not in tail-general, as stated in the declaration; and it was held by

nañces to the defendant *Greene*, to have for 51 years; by force of which demise he entered, and the said *Hilliard*, being

Mr. Baron *Thompson*, before whom the cause was tried, that this was a fatal variance, and the plaintiff was nonsuited. *Hardwicke v. Thompson*, Gloucester Summer Assizes, 1799. And for the same reason if the plaintiff, in an action of waste, declares of an estate to him and his *heirs-male*: and the defendant derives the estate to the plaintiff and his *heirs-female*, it is not good without a traverse of the estate surmised or alleged by the plaintiff; for these different limitations are a substantial variance. *Yelv. 141, Ewer v. Mole.*

It seems necessary in an action of waste, to state in the declaration the nature and kind of waste which is the subject of the action; and the plaintiff will not be permitted to give evidence of a different sort of waste from that which is laid in the declaration. If, for instance, the plaintiff charges the defendant with permissive waste, he cannot give evidence of voluntary waste committed by him; so if the defendant is charged with uncovering the roof of a dwelling-house, the plaintiff cannot give in evidence that the defendant removed some fixtures from it; just as if the breach alleged in an action of covenant should be, "that the defendant had not used the demised premises, or any part thereof, in a good and husband-like manner; but on the contrary thereof had committed, permitted and suffered to be made, done and committed in and upon the said demised premises, waste, spoil and destruction," the plaintiff will not be permitted to give evidence of the defendant's using the farm in an unhusband-like manner, unless it amounts to waste; for though the evidence would have been admissible on the former part of the breach, yet as the plaintiff had in the subsequent part of it narrowed it to waste, spoil and destruction, it is not competent to him to give evidence of any other particulars which did not come within the meaning of these words. 3 Term Rep. 307, *Harris v. Mantle*. It is true that the plaintiff is not bound to prove the whole waste stated, nor is there any necessity for the jury to find the particular circumstances of the waste, as in an action of waste, because there the plaintiff

is to have seisin of the place wasted; nor to find a verdict for the defendant for so much of the waste as the plaintiff does not prove, for in this action the plaintiff only goes for damages, and the jury may assess them generally; but yet the plaintiff is bound to set out the nature, quantity, and quality of the waste, that the defendant may be apprised of the charge, and prepared for his defence. If the action on the case be for voluntary waste committed in a house, as taking away the windows, for instance, the plaintiff must state the waste accordingly, in some such way as this, "that the said (defendant) wrongfully and unjustly, and without the licence and against the will of the said (plaintiff) pulled down, took down, and prostrated, and caused and procured to be pulled down, &c. divers, to wit, two (care must be taken that the number is sufficient) glass windows and twenty (a sufficient number) square feet of glass fixed in lead, of and belonging to the said messuage, and then affixed thereto, and of and belonging to the said (plaintiff) as landlord of the said messuage, and as parcel thereof, and being of the value of 10*l.*, and wrongfully and unjustly carried away, and caused to be carried away the same, and converted and disposed thereof to his own use, whereby &c." If the action be for permissive waste, the declaration is then conceived in some such form as this, "wrongfully and injuriously permitted and suffered the said messuages or dwelling-houses, stables, barns, and out-houses, to be prostrate, ruinous, fallen down, and in great decay, in the timber, doors, wainscots, windows, window shutters, floors, tiling, joists, beams, and rafters thereof, for want of needful and necessary repairing thereof" &c. If the action be for waste committed in trees or wood, the manner of assigning the waste may be in this form, "wrongfully &c. rooted up, pulled up, felled, cut up, prostrated, and destroyed, divers timber trees, and a large quantity of bushes, to wit, 500 (a sufficient number) oak trees, 500 ash trees, 500 elm trees, and 500 other trees, and 50 cart loads of bushes of the said (plaintiff) of the value of 1000*l.* then growing and being in and upon the said premises, and carried away the same,



seised of the reversion, afterwards by his will in writing devised it to the plaintiff *Cole*, and died, whereby the plaintiff was seised of the reversion: and being so seised, and the defendant *Greene* being possessed of the said messuage with the appurtenances for the term aforesaid, the said *Greene* "did make waste, sale, and destruction, in the houses of the said messuage, that is to say, by prostrating a brewhouse parcel of the said messuage of the price of 1000*l.* and taking away and selling the timber and roof thereof;" and so assigned several other wastes to the disinheriting of the plaintiff, "and against the form of the provision in such case made and provided" &c. To which the defendant pleaded *no waste made*, and thereupon issue was joined; "whereupon according to the custom of the said city it is commanded by the said court here to the beadle of the ward of Cripplegate without, to the beadle of the ward of Aldersgate, to the beadle of the ward of Farringdon without, and the beadle of the ward of Bishopsgate, being the four wards next adjoining to the said houses, that every of the said beadles separately do return and summon six good and lawful men of each ward of the said wards to be here in court at the next hustings &c. to try the said issue joined between the parties &c." And at the return of the said precept each of the said beadles returned the names of six jurors, none of whom came &c. whereupon a *distingas* was awarded against them, returnable at another day; and in the mean time let the said jury view the place wasted &c. and at the return of the said precept the beadles returned the precept served; and the jury appeared (but it was not returned that they had viewed the place wasted) and thereupon twelve of the said jury being sworn to try the issue "say upon their oath that the said defendant did waste, sale, and destruction, on the houses of the said messuage, to wit, by prostrating a brewhouse, parcel of the said messuage of the price of 100*l.*" and in like manner they found several other particular wastes to the value of 200*l.* in the whole; but they did not find any particular sale; and they assessed costs for the plaintiff to 12*d.* And because in the beginning the jury said

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and converted and disposed thereof to his own use, and wrongfully &c. lopped, topped, and shrouded, and caused and procured to be &c. divers other maiden trees, to wit, 40 oaks, 40 ashes, 40 elms, and 40 other trees of the said (plaintiff) of the value of 100*l.*, there then standing, growing, and being, and took and carried away the wood thereof coming, whereby &c." If the waste be in destroying the hedges, then the language of the declaration is generally this, "wrongfully and unjustly broke down, pulled

down, pulled to pieces, prostrated, spoiled and destroyed, the hedges, and fences, to wit, 100 perches of the hedges, and 100 perches of the fences, of the said (plaintiff) of and belonging to the said premises, and the bushes, thorns, and wood, thereof coming, to wit, 20 cart loads of bushes, 20 cart loads of thorns, and 20 cart loads of wood of the said (plaintiff) of the value of 20*l.*, took and carried away, and converted and disposed thereof to his own use &c."

that the defendant "did *make waste, sale, and destruction*," but did not afterwards find any particular sale, and also because they assessed costs of suit where none ought to be recovered, after several continuances, "because it appears to the court here that the said verdict given in this cause ought to be quashed, and is bad and erroneous, therefore the said verdict by the judgment of the said court is quashed, whereupon at the prayer of the said *Henry Greene*, the beadles of four wards of the said city are commanded, to wit, the beadle of the said ward of Cripplegate without, the beadle of the said ward of Aldersgate, the beadle of the ward of Bassishaw, and the beadle of the ward of Coleman Street, that every of them separately return and summon six good and lawful men of every ward of those wards to try the said issue &c. and these last four wards were not said in the record to be the four wards next adjoining to the place wasted, though in truth they were so; and the wards of Cripplegate without, and Aldersgate, were two wards next adjoining, and so it appeared on the record. And on the return of this precept a *distringas* was awarded returnable at another court, "and in the mean time let the jury have a view of the place wasted:" at which court the beadles returned their precept served, and also returned that the jury had viewed the place wasted, and thereupon the last jury being sworn to try the issue found a general verdict for the defendant, that there was no waste made; upon which the plaintiff *Cole* sued out a special commission of errors in London according to the custom directed to several judges; but the defendant, perceiving that *Cole* the plaintiff prosecuted such commission, would not pray his judgment of acquittal on the last verdict, whereupon the plaintiff *Cole* prayed judgment to be given against himself, so that he might proceed to impeach the judgment on the said commission of errors. And the question was if the court ought to give judgment in this case at the prayer of the plaintiff, or not; and upon advice it was ruled that the court ought to give judgment at the prayer of the plaintiff, for otherwise the plaintiff would be deprived of his remedy by writ of error to redress his grievance by the judgment, admitting it was erroneous; wherefore at the prayer of the plaintiff judgment was given for the defendant, "that the plaintiff take nothing by his writ, but be in mercy for his false claim, and that the said defendant go thereof without day" &c. See *Dyer*, 194 *b.* for giving judgment at the prayer of the other side. And upon this the plaintiff *Cole* proceeded on the commission of errors, and the judges commissioners sent to the mayor and sheriffs for the record in the hustings, to bring it before them at Guildhall on a day appointed; and thereupon a question was stirred, whether the first verdict, which was quashed as aforesaid, ought to be certified in the record, or ought to be wholly omitted out of it. And afterwards upon advice it was certified, for the verdict was not set

When the jury have found a verdict for the defendant, judgment may be given for him at the prayer of the plaintiff.

aside because the jury found against evidence, or for any undue practice or misconduct of the parties, but only for its insufficiency in point of law, which the court had adjudged on the verdict as it appeared before them on record; and therefore it ought to be certified as parcel of the record, and so it was (a).

And upon this record so certified, divers points were resolved by the judges commissioners, namely, *Moreton, Rainesford, Turner, Hale*, chief baron, and *Vaughan*, chief justice of the common bench, who delivered their opinions *seriatim* in Michaelmas term, in the 21st of the king that now is: to wit: 1. That the waste was well maintainable in London, for it was an action time out of memory; and though the statute

(a) But now, when a new trial is granted, no notice whatever is taken in the plea roll of the verdict, but, after the award of *venire*, the entry is this: "Afterwards the process being continued between the parties aforesaid of the plea aforesaid by the jury being respited between them (or in the K. B. before our lord the king at Westminster) until fifteen days of Easter thence next ensuing, unless the justices &c." and then follows the verdict returned upon the *postea*: As if, for instance, in a country cause, the *venire* is returnable in Trinity term, and the *distringas* or *habeas corpora* on the morrow of All Souls, with the usual clause of *nisi prius* in it, and a verdict is given at the assizes, which is afterwards set aside and a new trial granted; there is no necessity to continue in the plea roll the *venire* from Trinity to the term preceding the second trial by a *vicecomes non misit breve*, but the entry of the *postea continuato processu*, as it is called, is immediately after the award of the first *venire* returnable in Trinity term as before mentioned. And the reason seems to be because the statute of 32 H. 8. c. 30, having cured a discontinuance after verdict, it was no longer material to continue the jury process from term to term down to the issuing of the *distringas*, or *habeas corpora*. Gilb. H. C. B. 82, 3d edit. The award of the *distringas*, or *habeas corpora*, was never entered on the plea roll, for if the parties had not gone to trial, it would have been necessary to have awarded an *alias* and *pluries distringas*, or *habeas corpora*, which would have obliged the jury to have come up in terms, and also in such as were not issuable. Ibid. 79. And besides, a

new *venire* could not be awarded after a *distringas* or *habeas corpora*, until the statute 7 & 8 W. 3. c. 32. empowered the plaintiff to sue out a new *venire*, and therefore in case the jury appeared at the assizes and gave a verdict, which was afterwards set aside and a new trial granted, if the award of the *distringas* or *habeas corpora* had been entered on the plea-roll, there could have been no award of a new *venire* as the law stood before that statute; therefore the award of the *distringas* or *habeas corpora* was never entered on the plea roll. In the *nisi prius* roll, after the award of the *venire*, a new *placita* is entered, as well in the Common Pleas as in the King's Bench, of the term in which the cause is to be tried again, if in term, or preceding the second trial, if tried in the vacation. A new *placita* is added in order to satisfy the judge who tries the cause that it has been regularly continued, and that he has therefore an authority to try it. The return of the *juratu* must of course be altered; but it is not necessary that the *nisi prius* record should be re-engrossed, unless the *postea* has been indorsed upon it, though it must be passed again, and a new *venire* and *distringas*, or *habeas corpora*, must be sued out. Gilb. H. C. B. 80, 81. Tidd's Prac. K. B. 817, 818. In the *nisi prius* roll in the King's Bench a new *placita* is always entered after the award of the *venire*, though the parties go to the trial the same term in which issue is joined; but in the Common Pleas a second *placita* is not entered in the *nisi prius* roll, unless on the death or change of a chief justice, or it be an old record. Gilb. H. C. B. 81.

of Gloucester c. 5. gives treble damages, and in some cases gives them in an action of waste where none was before, yet no jurisdiction is taken away by the statute, and therefore the court that had jurisdiction before the statute to hold plea of waste shall have it now, as well in those cases where an action of waste is given by the statute, as in other cases at common law; see 8 H. 6. 34(a), that this action does not lie in ancient demesne, because they, on default on the grand distress, cannot make a writ to the sheriff to inquire of the waste as the statute appoints. See 7 H. 6. 35. (b) where in the end of the case it is said that it does not lie in London; but Lord Coke in 2 Inst. 299, says that an action of waste lies in London by custom (c). 2. That though the view was not returned on the process by which the first jury appeared and were sworn and tried the issue, yet it was good enough, because though the jury ought to have a view, yet it is not necessary for the officer to return it; but the court at the trial ought to examine the matter whether the jury had a view or not, for on the trial six jurors at least ought to have a view, or otherwise the jury should not be taken, 9 H. 6. 65b.; and in 24 E. 3. 26. a day of continuance was given, because the jury had not a view, and "in the mean time let them have a view &c.:" and in assize a view of the jury is requisite, but it is never returned, for perhaps the sheriff or the officer does not know whether the jurors have had a view or not; for the words of the writ are "and in the mean time let the jury have a view &c." and not, "and in the mean time you cause them to have a view;" so that the jury may view the place wasted when the officer is not present, and therefore the officer is not bound to return a view, but it ought to be examined at the trial; and the party may make his challenge to the jury for this cause, if six of them at least have not had a view; and if the officer has returned that they had a view, yet if at the trial it appears on examination that they have not had a view, the return will be to no purpose; and will not conclude any of the parties plaintiff or defendant: wherefore they resolved that the return was good enough without returning a view, which was not necessary to be returned, though it was necessary that the jury should have it. 3. They resolved that the first verdict was sufficient and good in law, on which the court of hustings ought to have given judgment for the plaintiff without quashing it and awarding a new venire; for the words, "waste, sale, and destruction," are only the title of the verdict, and not the substance of it, and the finding of particular wastes is the substance of the verdict; and therefore if the title of the verdict contain more

Though the jury have a view, the officer need not return it, but the court at the trial ought to examine whether the jury had a view.

The finding of particular waste is the substance of the verdict in waste.

(a) Bro. Ancient Demesne, 20.

(b) Ibid.

(c) So in Bro. Waste, 20, it is said, "that there is no action of waste in

London by the statute; yet note, they can bring an action of waste in their hustings by their custom."

# APPENDIX.

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The commis-  
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not only to re-  
verse the judg-  
ment, but also  
to give such  
judgment as  
the court of  
hustings ought  
to have done.

than is found by the verdict, it is but surplusage, which will not hurt the verdict which is perfect in itself; for if the jury had only found that the defendant "made waste, sale, and destruction," and had not found the particulars of the waste, the verdict had been bad and insufficient; therefore it appears, that the finding the particular wastes, being the special matter, is the substance of the verdict, and then the false titling of it in a place not material, will not make the verdict, which is well found in substance, vicious. Also the sale is not material of itself, as appears in *Easter, 29 Edw. 3. 33 a. (a)* where a writ of waste was brought for a chamber abated and sold, and the tenant pleaded that at the time of the lease it was too feeble, therefore it fell by tempest, and traversed that he abated it, and it was held a good answer, though he did not answer the sale; and to the same effect is *Longo Quinto Edw. 4. 100 b.*: and therefore they resolved that the first verdict was good and sufficient for the court of hustings to have proceeded to judgment without trying the matter *de novo*. 4. They resolved that the last verdict and the judgment given upon it was erroneous for two causes; one, because the last *venire* was awarded at the prayer of the defendant to beadles of four wards which are not said to be the next wards to the place wasted; and it appears before in the record, that all the first four wards, out of which the first jury came to try the issue at first, were the four next wards to the place wasted; but two of the last four wards do not appear to be so; and therefore this was a trial not according to the custom: the other cause is, because the court of hustings quashed the first verdict where it was sufficient, and they ought to have given judgment upon it, and therefore they erred in their judgment. 5. They resolved that the judges commissioners ought not only to reverse the judgment in the hustings given for the defendant by which the plaintiff was barred, and so restored the plaintiff to his action, but they ought also to give such judgment on the record before them, as the court of hustings ought to have done, namely, that the plaintiff shall recover the place wasted, and his treble damages, on the first verdict; and although *Dyer (b)* was cited, that where a writ of false judgment is brought on a judgment in a plea of land in ancient demesne where the demandant is barred by it, though the judgment be erroneous, yet the demandant shall only be restored to his action, and shall not have judgment to recover seisin of the land; for then, as the book says, a record will be of lands in ancient demesne out of the court of ancient demesne, which ought not to be, as it was urged; yet it was answered by the judges, that the commission to examine errors directed to them was a commission adapted and accommodated for the city of London, and

(a) *Fitz. Waste*, 143.

(b) 373 b. pl. 13.

commands and authorizes them to make *full and speedy justice* to the parties, which they do not make unless they give judgment for the plaintiff as well as reverse the judgment given against him, it appearing to them on the record that the court of hustings ought to have given such judgment for him, although they have given judgment against him; and as the case now is, if the judges will not give judgment for the plaintiff, the court of hustings cannot, and so there will be a failure of right. And therefore they held that where a writ in a real action is abated by judgment in the common bench, and on a writ of error this judgment is reversed in the King's Bench, now the court of King's Bench will proceed on the original writ, and give such judgment as the Common Bench ought to have given, if they had not given judgment to abate the writ, as appears in 4 *Inst.* 72. So where a special verdict was found in an ejectment in the King's Bench in Ireland, and the court there gave judgment thereon for the defendant, if a writ of error be brought upon it, the court of King's Bench here will not only reverse the judgment given in Ireland, but also will give such judgment as the King's Bench in Ireland ought to have given, namely, that the plaintiff shall recover his term, and his costs and damages; and so it was done in the case of *Mulcarray and others v. Eyres and others*, *Cro. Car.* 511. And also there is a case where a writ which was abated in Wales was adjudged good, and the parties pleaded thereto in the King's Bench; see for this 1 *Roll. Abr.* 774 (D), pl. 2. *Cro. Car.* 509, *Ceely v. Hoskins*, S. C. wherefore they concluded that the plaintiff should have judgment to recover on the first verdict. 6. And lastly they resolved, that judgment should be entered for the plaintiff for the place wasted and treble damages, "*no regard being had*" to the costs of suit taxed by the jury, for no costs of suit are recoverable in this action; and whereas it was objected, that the plaintiff in the hustings ought to have released the costs, and because he had not done so, the court did not err in not giving judgment for him on the first verdict, it was answered that the court *ex officio* ought to have given judgment at the prayer of the party, "*no regard being had*" to the costs, when it appears to them judicially that the plaintiff ought not to have recovered them (a).

And after the judges commissioners had delivered their opinions *serialim* as aforesaid, they gave judgment, that all the proceedings had and made in the said cause for the said se-

No costs recoverable in waste. If the jury give costs where none are recoverable, the court *ex officio* ought to give judgment, "*nullo habito respectu*" to the costs, when it appears judicially that the plaintiff is not entitled to them.

(a) By the statute 8 & 9 W. 3. c. 11. s. 3. it is enacted, that in all actions of waste, wherein the single value or damage found by the jury shall not exceed the sum of twenty nobles, the plaintiff obtaining judgment after plea pleaded or demurrer joined therein,

shall likewise recover his costs of suit; and if the plaintiff shall become nonsuit, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover his costs, and have execution for the same.

cond trial after the said first verdict, and also the said second verdict, and the judgment given thereupon as aforesaid, be reversed, annulled, and altogether held for nothing, and that the said *William* (namely, the plaintiff in the hustings) do recover seisin against the said *Henry* (namely, *Greene* the defendant) of the said places wasted, by the view of the jurors of the said first inquisition, and his said damages on occasion of the said waste above found trebled according to the form in the statute &c. which said trebled damages amount in the whole to 600*l.*, and the said *Henry* thereof in mercy &c. and likewise the said *William Cole* in mercy for his false claim against the said *Henry* for the residue of the said waste whereof the said *Henry* was acquitted by the said jury first impanelled, and as to the said residue of the said waste, let the said *Henry* go thereof without day &c.

Upon which judgment the said defendant *Greene* brought a writ of error in parliament, and assigned for error in fact, that the said first four wards out of which the first jury was impanelled were not the four wards next adjoining to the place wasted, but that the four wards out of which the last jury were impanelled were the four wards next adjoining to the place wasted, and because the custom of the city in the trial was not pursued, he said it was error; to which the said *Cole* the defendant in parliament pleaded *in nullo est erratum*; and it was said that the defendant in the hustings might have challenged the array if they were not returned out of the next wards, but he not having challenged the array then, cannot assign it for error now: to which it was answered, that there was no fault in the officer for which the defendant might have challenged the array, but it was the erroneous act of the court to award a *venire* to officers of wrong wards; as in an action where the venue on issue joined arises in Dale in the hundred of Dale, and the court awards a *venire facias de vicineto de Sale* in the hundred of Sale, now on the trial, if the hundredors of Sale appear, though there are no hundredors of Dale, the party cannot challenge for default of hundredors, because the officer has returned hundredors according to the writ of *venire*, although it was wrongly awarded; and therefore in such case it was error in the court to award such process of which the party cannot take advantage on the trial, but is to be aided by assigning it for error, so here; and of such opinion was *Wylde* justice of the Common Bench strongly. But afterwards it was resolved by the greater part of all the justices and barons, that though it was a wrong *venire*, yet it was aided by the statute of jeofails 21 Jac. 1. c. 13. for two of the said wards appear to be next to the place wasted, and so the venue was mis-awarded only in part; wherefore by their opinions the judgment was affirmed before the lords in parliament after the end of this term.



From this it is observable, that the said statute extends to inferior courts, and is not restrained to the courts of Westminster, and that an action of waste, though treble damages are recovered in it, is not such an action penal as is excepted out of the said act of 21 Jac. 1. for it is provided that the statute shall not extend to any action on any penal statute; therefore it seems that this action is not founded on a penal statute within the intent of the proviso of the said statute of jeofails, although the statute of Gloucester, c. 5. gives treble damages in this action.

But it seems to me doubtful, whether this case be aided by the statute of 21 Jac. 1. or not; for the statute intends only to aid those proceedings which were at common law, where the venue was mistaken in part by the award of the court; but when an issue is not to be tried by a jury *de vicineto* of the place where the issue arises according to the common law, but is to be tried by a jury of four wards adjoining according to a special custom, which would be erroneous at common law (the *venire* not being awarded *de vicineto*) unless it was supported by a special custom, there, when the custom, which takes away the common law, is not pursued, it seems the statute does not extend to aid it. But it was adjudged as above &c.

This case concerned one *Forth* an alderman of London, who had taken a lease from *Greene*, and had pulled down a brewhouse and built a number of small tenements in lieu thereof (*a*) for which *Cole* brought this action.

(a) In the report of this case in 1 Lev. 309. it is said, that by the building of the new houses, the rent was improved from 120*l.* to 200*l.* a-year; and the jury on the second trial, on account of this improvement, found a verdict for the defendant by the direction of *Wylde* the recorder; and afterwards a bill was filed in Chancery for an injunction, to be relieved from this judgment because the alleged waste was a melioration of the estate; and *Bridgman*, lord keeper, directed an issue to be tried at the bar of the court of King's Bench, whether it was waste or not; and upon the trial, *Hale* being then chief justice, it was resolved to be waste notwithstanding the improvement, because the nature of the thing and of the evidence was altered; and the jury gave a verdict accordingly. Ibid. 311. 1 Mod. 94, *Cole v. Forth*.

Upon the same principle, if a tenant convert ancient meadow into arable,

or arable or pasture into wood, or stub up or cut wood, and convert it into pasture, arable, or meadow; or if he convert meadow into an orchard, it is waste. Dy. 37 a. Co. Litt. 53 b. 2 Roll. Abr. 814, pl. 1. 6. 815, pl. 8. 2 Leon. 174. For it is generally true that the lessee has no power to change the nature of the thing demised. But he may stub up thorns, bushes, furze, and the like, growing in any meadow, arable, or pasture; for that is good husbandry, and the land is improved by it, and the common law gives such things to the tenant for fuel. Dy. 37 a. And if meadow be sometimes arable, and sometimes meadow, and sometimes pasture, the plowing of it is no waste. 2 Roll. Abr. 815. So if the tenant pulls down a house, and rebuilds another not so long and wide as the other, it is waste. 2 Roll. Abr. 815, pl. 17. So if he rebuilds it more large than it was before, it is waste, for it will be a greater charge to the



No. XXXVII (a).

As to who shall pay the expense of party walls rebuilt under the authority of the Building Act.

**COLLINS v. WILSON (b).**—Easter Term, 1828.

Owner of improved rent under Building Act.

The defendant took land on a building lease from one N., at the yearly rent of 5*l*. Subsequently he let a part of the ground to one G., at 20*l*. a-year:—Held, that he was therefore the owner of the *improved* rent under the Act, and as such liable to contribution to a party-wall, used in the erection of a house on such land by G. *Semble*—that the notice required by the 41st section of the Act, does not apply to the erection of a new building, but only to the renewal of an old party-wall.

This was an action of assumpsit for contribution to a party-wall.

The first count of the declaration stated, That, after the making of a certain Act of Parliament, made and passed in

lessor to repair it. *Ibid.* pl. 18. It is a question whether it is waste to build a new house. *Kellw. 38 b. Hob. 234. 2 Roll. Abr. 813, pl. 22. Co. Litt. 53 a. 11 Mod. 7.*

Waste is either voluntary, or permissive, *Co. Litt. 53 a.* If the lessee pulls down the houses demised, or any part of them, as the windows, doors, shutters, fixtures, floors, or the like; or cuts down the fruit trees in a garden or orchard; or if lessee for life or years opens new mines in the land demised, where no mention is made in the lease of mines, *Co. Litt. 53 b. 5 Rep. 12, Saunders's case. 2 Mod. 195, Astry v. Ballard;* or digs for gravel, lime, clay, brick, earth, stone, &c. in pits not open, *Co. Litt. 53 b.* or cuts down timber, either oak, ash or elm, which are universally timber; or such trees as are timber by the custom of the country where they grow, such as beech, and the like; or changes the nature of the thing demised, as has been already mentioned—these acts amount to voluntary waste. But if the lessee suffers the houses demised to fall into decay for want of necessary repairs, this is permissive waste, and is equally within the provisions of the statute of Gloucester, 6 *Edw. 1. c. 5.* as voluntary waste is, *Co. Litt. 53 a. See 1 Bos. & Pul. New Rep. 290, Gibson v. Welles.*

But where the house was uncovered at the commencement of the lease, it is no waste in the tenant to suffer it to decay, without pulling it down. *Co. Litt. 53 a. Ow. 92, 93, Glover v. Pipe.* So it is no waste, for the tenant to remove furnaces, coppers, or other utensils of trade, or marble chimnies, though fixed to the freehold. 1 *Salk. 368, Poole's case. 1 Atk. 477, Ex parte Quincy. 1 P. Wms. 94, Beck v. Rebow. 3 Atk. 13, Lawton v. Lawton. 1 H. Black. 259, Lawton v. Salmon, note (a).* But see *Elwes v. Maw, 3 East, 38.* So if lessee for life or years digs for metal, coal, and the like, in mines that were open at the time of the lease, where there is no exception of mines, it is no waste. *Co. Litt. 53 a. 54 b. 5 Rep. 12 a. Saunders's case. 2 Roll. Abr. 816, pl. 31.* So if a man has mines hid within his land, and leases his land, and all mines therein, it is no waste for the lessee to open pits and dig for them. 5 *Rep. 12 a. Saunders's case.* But it is otherwise when the mines are not granted by name. *Hob. 234, Lord Darcy v. Askwith.* And, if in the case of an express grant of mines, there be open mines at the time of the lease, the lessee can only dig in the open mines, and not sink any new pits. *Co. Litt. 54 b. 2 Roll. Abr. 816, pl. 32.*

(a) See the *Treatise*, page 243.

(b) *Law Journ.* vol. vi. pt. 10. p. 107.

the 14th year of the reign of his late Majesty King George the Third, intituled, "An Act for the further and better regulation of buildings and party-walls, and for the more effectually preventing of mischiefs by fire, within the cities of London and Westminster, and the liberties thereof, and other the parishes, precincts, and places within the weekly bills of mortality, the parishes of St. Mary-le-bone, Paddington, St. Pancras, and St. Luke at Chelsea, in the county of Middlesex, and for indemnifying, under certain conditions, builders and other persons against the penalties to which they are or may be liable, for erecting buildings within the limits aforesaid, contrary to law," to wit, on &c. the plaintiff was lawfully possessed of a certain piece or parcel of ground, situate within the weekly bills of mortality, to wit, in &c., and, at his own expence, had erected and built thereon a certain messuage or tenement, and had erected and built a certain party-wall, parcel of the said messuage or tenement, agreeably to the directions of the said Act of Parliament, and having so erected and built the said messuage or tenement, and the defendant then being the owner and occupier of a certain piece or parcel of ground, situate within the weekly bills of mortality, to wit, in &c., and adjoining to the said messuage or tenement so erected and built by the plaintiff, and abutting thereupon, he, the defendant, afterwards, to wit, on &c., did begin to erect and build, and did erect and build, and cause and procure to be erected and built, on the said last-mentioned piece or parcel of ground, a certain messuage or tenement of the same rate or class of building as the messuage or tenement first above-mentioned; and did, for the purpose of erecting and building the same, cut into and make use of the said party-wall of the plaintiff, to wit, at &c. The plaintiff then averred, that at the time of the making use of the said party-wall, and cutting into the same by the defendant as aforesaid, the defendant was the owner of, and entitled to, the improved rent of the said adjoining building, so erected and built as aforesaid, to wit, at &c.; and that the plaintiff did, as soon after the cutting into and using the said party-wall by the defendant as aforesaid as conveniently might be, to wit, on &c., at &c. deliver, and cause to be delivered, to the defendant, a true account in writing of the number of rods in the said party-wall so cut into and made use of by the defendant as aforesaid, for which the defendant, as owner of such adjoining building as aforesaid, by virtue of the said Act of Parliament, was liable to pay to the plaintiff a large sum of money, to wit, the sum of 100*l*. (there being no deductions to be made thereout for old materials or otherwise), and did then and there demand payment thereof from the defendant; by reason whereof, and by force of the said Act of Parliament, he, the defendant, then and there became liable to pay to the plaintiff the said sum of 100*l*., within twenty-one days next after such demand thereof as

aforesaid; and being so liable, he, the defendant, in consideration thereof, afterwards, to wit, on &c., at &c., undertook, and then and there faithfully promised the plaintiff to pay him the said sum of 100*l.* within twenty-one days next after such demand thereof as aforesaid. *Breach*—Non-payment within twenty-one days or since.

The second count stated, that the defendant, afterwards, to wit, on &c., at &c., was indebted to the plaintiff in the further sum of 100*l.* for part of the expenses of building a certain other party-wall, before then built, at the expense of the plaintiff, agreeably to the directions of the said Act of Parliament, between a certain other messuage or dwelling-house, situate and being within the weekly bills of mortality, to wit, in &c., and certain other ground, there also situate, next to and adjoining the said last-mentioned party-wall; and which said last-mentioned party-wall had before then been cut into and made use of by the defendant, who, before and at the time of cutting into and making use of the same, was the owner of, and a person entitled to, the improved rent of such last-mentioned ground; and, being so indebted, he, the defendant, undertook and promised the plaintiff to pay him the said sum of money last-mentioned, whenever afterwards he, the defendant, should be thereunto requested.

The declaration also contained the usual money-counts, and an account stated.

The defendant pleaded non-assumpsit.

At the trial, before Lord Chief Justice *Best*, at Westminster, at the Sittings after last Trinity Term, the following facts appeared in evidence :—

Facts of the case.

The defendant held, on a building lease from the Marquis of *Northampton*, a parcel of ground in Spafields, at the yearly rent of 5*l.* In the year 1820, he entered into an agreement with the plaintiff to grant him an under-lease of a part of such ground, for a term of ninety-six years, at the yearly rent of 20*l.* The defendant also entered into a like agreement with one *Gubby*, for a lease of another piece of ground adjoining to the plaintiff's, on the same terms. The plaintiff built a house on the ground agreed to be demised to him. The defendant, as a builder, also erected another on the adjoining ground for *Gubby*, using the party-wall of the plaintiff's house. On the 30th of September, 1820, (the house in question being then covered in), the defendant sold to one *Goodwin* all his interest in the land demised to him by the Marquis of *Northampton*, which he conveyed to him by a lease of that date, reciting the agreements with the plaintiff and with *Gubby*,

and *Goodwin* afterwards granted leases to them in pursuance of these agreements. The plaintiff, on his wall being used, caused it to be surveyed, and an account to be taken of the number of rods contained in it, in accordance to the direction of the 41st section of the Building Act, 14 Geo. 3. c. 78(a).

(a) Section from the original Act:—  
 “And be it further enacted by the authority aforesaid, that the person or persons at whose expense any party-wall or party-arch shall be built agreeably to the directions of this Act, shall be reimbursed by the owner or owners who shall be entitled to the improved rent of the adjoining building or ground, and who shall at any time make use of such party-wall or party-arch, a part of the expense of building the same, in the proportion after mentioned, (that is to say); if the adjoining building then erected or afterwards to be erected be of the same rate or class of building as, or superior to, the building belonging to the person or persons at whose expense the said party-wall was built, then the owner or occupier of such adjoining building or ground shall pay one moiety of the expense of building so much of the said party-wall or party-arch as such owner or occupier shall make use of; and if the adjoining building then erected or afterwards to be erected be of an inferior rate or class of building, then the owner or occupier of such adjoining building or ground shall pay a sum of money equal to one moiety of the expense of building a party-wall or party-arch of the thickness by this act required for the rate or class of building whereof such adjoining building shall be, and of the height and breadth of so much of the said party-wall or party-arch as such owner or occupier shall make use of; and in the mean time and until such moiety or other proportional part of the expense of building such party-wall or party-arch be so paid, the sole property of such whole party-wall or party-arch, and of the whole ground whereon the said party-wall shall stand, shall be vested entirely in the person or persons at whose expense the same shall be built: and such moiety or other proportional part of the expense of building such party-wall or party-arch shall be so paid to the person or persons at whose expense the same shall be built, or in whom the property thereof shall be vested, at the times hereinafter men-

tioned; (that is to say), in respect of every such party-wall to any house or building wherunto, at the time of building the same, no other house or building was adjoining, so soon as such party-wall shall be first cut into or made use of; and in respect of every such party-wall or party-arch as shall be built against or adjoining to any other house or building, so soon as such party-wall or party-arch shall be completely built and finished: and in respect of such last-mentioned party-wall or party-arch, the owner or occupier of such adjoining house or building shall, together with such proportional part of the expense of building such party-wall or party-arch, also pay a like proportional part of all other expenses which shall be necessary to the pulling down the old party-wall, or timber or wood partition, and the whole of all the reasonable expenses of shoring up such adjoining house or building, and of removing any goods, furniture, or other things, and of pulling down any wainscot or partition, and also all such costs, if any, as may have been awarded by the said Court of Mayor and Aldermen, or Court of Sessions as aforesaid; but not any part of the expense of pulling down and clearing away any such old party-wall or party-arch or old partition, if any such there was: and it is hereby directed, that the expense of building such party-wall or party-arch shall be estimated after the rate of seven pounds fifteen shillings by the rod for the new brick-work, deducting thereout after the rate of twenty-eight shillings by the rod for the materials (if any) of so much of the old wall or arch as did belong to such adjoining building or ground, and also after the rate of twopence by the cubical foot for the materials (if any) of so much of the old timber partition as did belong to such adjoining building or ground: and that within ten days after such party-wall or party-arch shall be so built, or so soon after as conveniently may be, such first builder or builders shall leave at such adjoining house or building a true account in writing of the number



As, however, he did not then know on whom to call for contribution, whether on the defendant or on *Gubby*, each of whom disclaimed all liability, he did not deliver the account until June, 1826, when he caused the following notice and demand to be served on the defendant:—

“In pursuance of a certain Act of Parliament, made and passed in the 14th year of the reign of his late Majesty King George the Third, intituled, ‘An Act for the further and better regulation of buildings and party-walls, and for the more effectually preventing mischiefs by fire, within the cities of London and Westminster and the liberties thereof, and other the parishes, precincts, and places within the weekly bills of mortality, the parishes of St. Mary-le-bone, Paddington, St. Pancras, and St. Luke at Chelsea, in the county of Middlesex, and for indemnifying, under certain conditions, builders and other persons against the penalties to which they are or may be liable, for erecting buildings within the limits aforesaid, contrary to law,’ I, *James Collins*, of &c., do hereby demand of you payment of the annexed account, being an account of a moiety of the expense of building a certain party-wall, built by me or by my order, and at my expense, and being parcel of the messuage or dwelling-house now occupied by me, situate and being at &c., and which said party-wall has been cut into and made use of by you, by your building against the said

of rods in such party-wall or party-arch for which the owner or owners of such adjoining building or ground shall be liable to pay, and of the deduction which such owner or owners shall be entitled to make thereout on account of such materials, and also an account of such other expenses and costs as aforesaid; whereupon it shall be lawful for the tenant or occupier of such adjoining building or ground to pay one moiety, or such proportional part as aforesaid, to such first builder or builders for the same, and also for shoring and supporting such adjoining building as aforesaid, and for all such other expenses as are hereinbefore directed to be paid by the owner or owners of such adjoining building or ground, and to deduct the same out of the rent which shall become due from him or her to such owner or owners, under whom he or she holds the same respectively, until he or she shall be reimbursed the same: and in case the same be not paid within twenty-one days next after demand thereof, then the same shall and may be recovered, together with full costs of suit, of and from such owner or

owners, by action of debt or on the case, in any of his majesty's courts of record at Westminster, whereupon essoin, protection, or wager of law, or more than one imparlance, shall be allowed: And if the plaintiff or plaintiffs in any such action shall, three calendar months at the least before the commencement thereof, give notice in writing to the person or persons against whom such action is intended to be brought, of his, her, or their intention to bring the same, or leave the same at his, her, or their last or usual place of abode, and shall in such notice specify the sum for which it is to be brought, and also annex to such notice a bill of the just and true particulars of the expenses and charges with which the intended defendant or defendants is or are to be charged; then such plaintiff or plaintiffs, if he, she, or they recover the full sum specified in such notice, shall also recover and be entitled to double costs of suit, and shall have and be entitled to the like remedies for recovery thereof, as are usually given for costs in other cases of costs at law.

messuage or dwelling-house a certain other messuage or dwelling-house, of the same rate or class of buildings. Dated &c."

On the part of the defendant, it was contended, that *Gubby* alone was liable to contribute, he being the owner of the house; and it was objected, that the account or notice required by the Act was not given in due time, the Statute directing it to be given within ten days after the building of the wall.

His Lordship, however, was of opinion, that the defendant must be considered the owner of the improved rent within the meaning of the Act; and that, under the circumstances, the notice and account or estimate were given in due time. The jury accordingly found for the plaintiff. Verdict.

Mr. Serjeant *Wilde*, in the course of the succeeding Term, obtained a rule, calling on the plaintiff to shew cause why this verdict should not be set aside and a nonsuit entered, or a new trial had.

Mr. Serjeant *Spankie* and Mr. Serjeant *Storks* then shewed cause.—The liability under the Act attaches, when the party-wall is cut into and used, and to the party who so cuts into and uses it. Here, the defendant had used and cut into the wall before he disposed of his interest to *Goodwin*; for the assignment was not made until after the house built by the defendant was roofed or covered in. The defendant, therefore, was the only person entitled to any rent at that time. In *Sangster v. Birkhead* (a), it was held, that, if the lessee of a house at rack-rent under-let it at an advanced rent, he is liable to contribute to the expenses of building a party-wall under the Act. The cases of *Southall v. Leadbetter* (b), *Peck v. Wood* (c), and *Beardmore v. Fox* (d), are all to the same effect. In the first of these, Mr. Justice *Ashhurst* said, "The legislature intended to throw this burthen on the lessees of building leases, by whom the value of the estates is considerably improved, and who afterwards make under-leases, reserving improved rents." With respect to the objection as to the lateness of the notice and delivery of the account or estimate, it is entitled to no weight. None could, under the circumstances, have been furnished within the time mentioned in the Act; for there was then no adjoining building. The account was furnished by the plaintiff as soon as he could conveniently or effectually do so.

Mr. Serjeant *Wilde*, in support of the rule.—Before the house in question was built, *Gubby* was in possession of the

(a) Bos. & Pul. vol. i. p. 303.

(b) Term Rep. vol. iii. p. 458.

(c) Term Rep. vol. v. p. 130.

(d) Term Rep. vol. viii. p. 214.

ground on which it stood, under an equitable agreement, which was afterwards carried into effect by *Goodwin*; and the only interest which the defendant had in the premises was a small advance of ground-rent. An equitable agreement, according to the case of *Taylor v. Read*(a), is sufficient to charge the grantee.

Though the notice in this case could not have been given within the time prescribed by the Act, inasmuch as the second house was not then built; yet the plaintiff should have caused notice to be given within a reasonable time, or "as soon as conveniently might be" after the building of the party-wall; and here he did not give any notice until nearly six years after the liability had attached.

*By the Court.*—Owing to the obscure wording of the Act, there was some doubt, at the trial, as to who was the party chargeable as owner of the *improved rent*. We now, however, clearly think that the defendant was. It appeared that the defendant was the lessee of the land on which the houses in question were built. The plaintiff held a portion of the ground, at an advanced rent, under an agreement for a lease to be granted by the defendant. *Gubby* also held the adjoining ground in a similar manner, at a rent of 20*l.* per annum. The defendant was, therefore, the owner of an improved rent, and continued so until the 30th of September, 1820, when he assigned his interest to *Goodwin*; but the plaintiff's wall had been used before the defendant so assigned his interest. It is difficult to discover what the meaning of the Act is; but the most reasonable construction seems to be, that the owner or occupier of land in the first instance is not chargeable; but that when, by the building of houses on the land, he becomes entitled to a rent beyond that which the ground in its original state produced, he shall be charged in respect of such improved rent; and this liability attaches from the moment the party-wall is used or cut into.

The objection as to the notice is totally without foundation. Under all the circumstances, it appears to have been given as soon as conveniently it could have been. Besides, the ten days' notice seems to apply to cases where old walls are taken down and new ones built, and not to new walls, where, at the time of building them, there is no adjoining house.

Rule discharged.

[The Editor of the *Law Journal*, in whose work the foregoing case is reported, says, as a note to it, that the correctness of this decision may admit of some consideration;

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(a) Taunt, vol. vi. p. 249.

for it would seem, from the words of the Act, that the party intended to be charged with the moiety of the expense of building a party-wall, is he who actually *cuts into and uses* it, and not, as above is holden, the mere *ground-landlord*, who, in fact, derives no benefit from it. The doctrine the Court here lays down cannot be easily reconciled with that to be found in *Peck v. Wood* (a), where it was determined that the owner of a *ground-rent* was *not* chargeable; and that case is strictly in point with the present. All the other decisions on the subject are cases concerning the owners of houses only. Here, it is clear that the *plaintiff*, when he brought his action, considered the defendant to be actually *the owner of the house*. Now, this he does not appear to have been proved to be; but, on the contrary, the conveyance from the defendant to *Goodwin*, (which was given in evidence), expressly recited an agreement under which *Gubby held the ground*; and it appeared that that agreement was afterwards carried into effect by *Goodwin*, who executed a lease to *Gubby* in pursuance thereof. In coming to a decision, however, the Court considered that the defendant's *making a profit*, or receiving *an advance of rent for the ground*, constituted him the owner of *an improved rent* within the meaning of the Act—a meaning probably, not contemplated by the legislature.]

## No. XXXVIII (b).

## CAP. XCVII.—OF BUILDINGS (c).

"We have not read of any act of parliament now in force made against the excesse of building, or touching the order or manner of building: but it is a wasting evill, whereunto some wise men are subject.

"But the common law doth prohibit any subject to build any castle, or house of strength imbattelled &c. without the king's licence, for the danger that might ensue.

"(d) Also the common law prohibiteth the building of any edifice to a common nuisance, or to the nuisance of any man in his house, as the stopping up of his light, or to any other prejudice or annoyance of him. *Ædificare in tuo propria sola non licet, quod alteri noceat.*

(a) See the Treatise, chap. iii.

(b) From Lord Coke's Institutes, part iii. p. 201.

(c) See the 1st part of the Institutes, sect. 1. fo. 5 a. Vet. Mag.

Cart. part 1. fo. 162. Cap. Echnetry, &amp;c. 14 H. 6. m. 7, licence to the D. of Glouc. to imbattel Greenwich.

(d) LL. 9. f. 34 &amp; 38. Lib. 2. fo.

101, &amp;c.



(a) In Deuteronomy it is said, *Cum edificaveris domum novam, facies (b) murum tecti per circuitum ne effundatur sanguis in domo tua, et sis reus, labente alio, et in præceptis ruente.*

(c) I like well the counsell to a nobleman, whosoever gave it. *Si vis (ait ille) ædificare domum, inducat te necessitas, non voluptas; cupiditas ædificandi ædificando non tollitur; nimia et inordinata cupiditas ædificandi expectat ædificii venditionem; turris completa, et arca evacuatur faciunt tarde hominem sapientem.*

*Ædificare domos multas, et pascere multos,  
Est ad pauperiem semita laxa nimis (d).*

To build many houses, and many to feed,  
To poverty that way doth readily lead.

Of these three it hath been truly said: *Vestium, convivi-  
orum, et edificiorum luxuria agre civitatis sunt indicia, et  
species prodigalitatis.*

(e) But by the common law, and generall custome of the realm, it was lawfull for bishops, earls and barons to build churches, or chappells, within their sees: and hereof King John informed Pope Innocentius the Third, (naming only, *honoris causa*, the bishops and baronage of England, albeit this liberty extended to all) with request that this liberty to the baronage might be confirmed.

To these letters the Pope made this answer, *Quod enim de consuetudine regni Anglorum procedere regia serenitas per suas literas intimavit, ut liceat tam episcopis, quam comitibus, et baronibus ecclesias in feudo suo fundare, laicis quidem principibus id licere nullatenus denegamus, dummodo diocesani episcopi eis suffragetur assensus, et per novam structuram veterum ecclesiarum justitia non ledatur (f).* Whereas the baronage had absolute liberty before, now the Pope addeth the consent of the bishop: but that addition bound not, seeing it was against the liberty of the baronage warranted by the common law: and we would not have rehearsed this epistle, but that it is a proof what the generall custome of the realm was concerning the building of churches by the baronage of England. And albeit they might build churches without the

(a) Duet. 22. 8.

(b) Battlements; this was for safety only.

(c) Bernhard consilium.

(d) Enripides, translated by Sir Th. Moore.

(e) Vide the like in the Regist. 36 b.

Prohib. de decimis seperatis. Epist. decret. Innocent. 3. l. 10. page 222.

(f) Tr. 20 E. 1. Rot. 15, in Banco,

Rich. de Jury's Case, Eborum.

King's licence, yet could they not erect a spirituall politike body to continue in succession, and capable of endowment without the king's licence; but by the common law before the statutes of Mortmain, they might have indowed this spirituall once incorporated, *perpetuis futuris temporibus*, without any licence from the king or any other.

And as the law is in cases of devotion and religion, so it is in cases of charity: any man may erect and build a house for an (a) hospital, school, working-house, or house of correction, or the like, without any licence, for that is but a preparation, and may be done as owner of the soyl; but by the common law could not incorporate any of them without licence, but now he may, and indow them with lands in certain cases, (b) by the statutes of 39 Eliz. cap. 5. and 3 Car. ca. 1. as in the second part of the Institutes in the exposition of those statutes it appeareth.

Concerning the building or erecting of (c) tombs, sepulchers or monuments for the deceased, in church, chancell, common chappell, or church-yard in convenient manner, it is lawfull, for it is the last work of charity that can be done for the deceased, who whiles he lived was a lively temple of the Holy Ghost; with a reverend regard, and Christian hope of a joyfull resurrection. And the defacing of them is punishable by the common law as it appeareth in (d) the book of 9 E. 4. 14 a. And so was it agreed by the whole Court, Mich. 10 Jac. in the Common Place, between *Corven* and *Pym*. And for the defacing thereof, they that build or erect the same shall have the action during their lives, (as the Lady Wiche had in the case of 9 E. 4.) and after their deceases, the heir of the deceased shall have the action. But the building, or erecting of the sepulchre, tomb, or other monument (e) ought not to be to the hinderance of the celebration of divine service. And in that case of *Corven* it was resolved, that albeit the freehold of the church be in the parson, yet if a lord of a mannor, or any other, that hath an house within the town or parish, and that he, and all those whose estate he hath in the mansion house of the mannor or other house, hath had as sent in an isle of the church, for him and his family only, and have repaired it at his proper charges, it shall be intended that some of his ancestors, or of the parties whose estate he hath, did build and erect that isle for him and his family only; and there-

(a) Lib. 10. fo. 27. Le case de Sutton's Hospital. See the Statute of 39 Eliz. cap. 4, whereby authority is given to justices of peace to build and erect houses of correction, &c.

(b) 39 Eliz. cap. 5. 3 Car. ca. 1.

(c) Tumba tumulus sepulchrum.

(d) 9 E. 4. 14, the La. Wiche's Case, wife of Sir Hugh Wiche. Mich. 10 Ja. in Communi Banco, int' *Corven* & *Pym*.

(e) Barth. Cassanensis, fo. 13. Conclus. 29. Ativ. datur, siquis arma in aliquo loco prosita delevit, seu abrasit, &c.

fore if the ordinary endeavour to remove him, or place any other there, he may have a prohibition. (a) It was further resolved, that if any man hath a house in a town or parish, and that he and those whose estate he hath in the house, hath had time out of mind a certain pew, or seat in the church maintained by him and them, the ordinary cannot remove him; (for prescription maketh certainty, the mother of quietness) and if he doe, a prohibition lieth against him. (b) But where there is no prescription, there the ordinary that hath the cure, and charge of soules, may, for avoiding of contention in the church or chappell, and the more quiet and better service of God, and placing of men, according to their qualities and degrees, take order for the placing of the parishioners in the church or chappell publique, which is dedicated and consecrated to the service of God. *Nota*, funerall expenses according to the degree and quality of the deceased, are to be allowed of the goods of the deceased, before any debt of duty whatsoever, for that is *opus pium*, or *charitativum*.

Amongst the people of Almighty God, as it appeareth in the holy history, sepulture was ever had in great reverence, not only of kings, but of other men; as amongst many others good old Barsilai, when he had excused himself for not going with the king to Jerusalem, he concluded, *Obsecro et rogo, serous tuus, et mortar in civitate mea, et sepelietur iuxta sepulchrum patris mei, et matris mee, &c.* (c)

And also the morall heathens had building and erecting of sepulchers, or monuments in great account, as it doth appear by the seven wonders of the world, which for memory may be expressed in these few verses:

1. *Pyramides Memphis*, 2. *Babylonis moenia celsa*,
  3. *Templum ingens Ephesi virgo Diana tuum*,
  4. *Mausoli Carici monumentum*, 5. *Raraque Phoebe Turris*,
  6. *Olympiaci splendida imago Jovis*,
  7. *Denique apud Rhodios splendentis statua Phœbi*.
- Hæc septem mundus mira, viator, habet.*

Besides the religious and Christian regard abovesaid, these monuments do serve for four good uses and ends. First, for evidence, and proof of descents, and pedigrees. Secondly, what time he that is there buried deceased. Thirdly, for examples, to follow the good, or to eschew the evill. Fourthly, to put the living in mind of their end, for all the sons of Adam must die. *Statutum est hominibus semel neori.*

(a) 8 H. 7. 12. 3. per Hussey, accord. Pasch. 10 Jac. in curia Com. Stellate, inter Hussey, plaintiff, and Kath. Layton & Al. defendants, issent resolve per la court.

(b) 8 H. 7. 12. 3. acc. 12 H. 7. 12. per Hussey.

(c) 2 Sam. 19. 37.

*Monumentum servat alicujus rei memoriam aliter interiturum, eamque nobis repræsentat*: and therefore a monument is called a memoriall.

*Monumentum dicitur à monendo; quicquid enim nos monet est monumentum, et sepulchrum, quod nos sumus mortales. Cum tumulum cernis tum tu mortalia spernis. Esto memor mortis, sisque ad cœlestia fortis.* It is to be observed, that in every sepulcher, that hath a monument, two things are to be considered, viz. the monument, and the sepulcher or buriall of the dead. (a) The buriall of the *cadaver*, (that is *cave date veribus*) is *nullius in bonis*, and belongs to ecclesiastical cognizance, but as to the monument, action is given (as hath been said) at the common law for defacing thereof.

In the year of our Lord 1586, and in the 29th year of the reign of that glorious Queen Elizabeth, was the old gate called Ludgate in the city of London (as Stowe (b) saith), taken down to be new builded; there was found couched within the old wall thereof a stone, wherein was graven in the Hebrew tongue and characters (c), an epitaph, signifying in English: *This is the tomb of Rabbi Moses, son of the illustrious Rabbi Isaac; which certainly was before the reign of H. 2. anno Domini 1177, for before that time all the Jews in England were buried within the city of London, and in that year, saith Hovenden, Dominus rex pater dedit licentiam Judæis terras suas habendi cameterium in qualibet civitate Angliæ, extra muros civitatum, ubi possunt rationabiliter, et in competenti loco canere, ad sepeliend' mortuos suos; prius enim omnes Judæi urbi Londinæ ferebantur sepeliendi.*

And albeit churches or chappels may be built by any of the king's subjects, (as hath been said) without licence, yet before the law take knowledge of them to be churches or chappels, the bishop is to consecrate or dedicate the same (d): and this is the reason, that a church, or not a church, a chappel, or not a chappel, shall be tried, and certified by the bishop.

See for this dedication or consecration the 43d chapter of Ezechiel, the 23d chapter of Genesis, the 90th Psalme, the 24th, 26th, 27th, 84th, and 134th Psalms, the 2d of Samuel, 6, 10 of St. John, verse 22 to the end.

*Vide inter leges Edwardi Confessoris, cap. 3. Similiter ad dedicationes, ad synodos, et ad capitula venientibus, &c. in cundo, et redeundo sit summa pax.*

(a) Britton, fo. 84 b.

den, anno Dom. 1177. Holl. eodem.

(b) Stowe, in his Survey of London, an. fo. 101 b. 20.

fo. 19.

(d) 8 H. 6. 32. 37.

(c) For so is the truth, Ro. Hoven-

We find in ancient times that vaults, hollow places, or substructions (a) under the ground were made by men for receipts, or receptacles for taking their wives, children, money and goods secret, to avoid violence and rapine in time of hostility or rebellion, and we find no law against them.

These kind of buildings we had from the Germans, as we find it in Tacitus (b), who treating of the old Germans saith, *Solent et subterraneos specus aperire, et si quando hostis advenit, aperia populatur, abdita autem et defossa aut ignorantur, aut eo ipso fallunt, quod querenda sunt.* They use to build vaults under the earth, and if the enemy come, he destroyeth all open and above ground, but such things as lie hidden in the cave, either they lie unknown, or at least they deceive him, in that he is enforced to find them out. Neither have we found any licence of the king to make them, nor punishment of any that made them without licence, and yet many have been made by many subjects, some whereof (c) we have seen.

(d) We read of Alexander, Bishop of Lincoln, in the reigns of H. 1. and King Stephen, a Norman born, who was, *insanis substructionibus ad insaniam delectatus.*

(e) No person can build or erect light-houses, pharos, sea-marks, or beacons without lawful warrant and authority.

*Lumina noctivaga tollit pharus emulatum.*

In light-house top is reared the light,  
As high as the moon that walks by night.

(f) Provision was made by authority of Parliament for building and erecting blockhouses, bulwarks, piles, and the like, for without Parliament subjects cannot be charged with building (g) or erecting of them, and that act is expired.

(h) The lord of the soil may build a windmill, sheep-cote, dairy, enlarging of a court necessary, or a curtilage in grounds, where men have common of pasture.

(i) A man cannot erect any building upon his own ground in the king's forest, but it is a purpresture, and may either be demolished or arrented to the king's use &c. at a justice seat.

(a) De subterraneis substructionibus, et cryptis.

(b) Tacitus.

(c) In the manner of Minster Lovel, in com' Oxon, &c.

(d) Camden, Linc. pag. 4. 6.

(e) See the statute of 8 Eliz. ca. 13, and the letters patents of the Lord Admirall,

(f) 4 H. 8. ca. 1.

(g) De propugnaculis munimentis, &c. of bulwarks, barbicans, block-houses, piles, &c.

(h) 13 E. 1. ca. 46. 32 Ass. 5. 7 H. 4. 39.

(i) 7 El. Dier, 240.

Concerning houses of husbandry and tillage, the statutes of 4 H. 7. cap. 19, 7 H. 8. cap. 1, 27 H. 8. cap. 22, 5 E. 6. cap. 5, 5 El. cap. 2, are repealed by the statute of 21 Jac. 1. cap. 28, and the statutes of 39 El. cap. 1 & 2 are expired, for that they were so like labyrinthes, with such intricate windings and turnings, as little or no fruit proceeded of them.

(a) No man can erect a house or building to the nuisance of any other.

(b) See where a man hath any house or mill &c., and having any privilege or thing appurtenant thereunto, and pull it down and build anew, where the privilege or appurtenant remain and where not.

(c) Concerning the erecting &c. of cotages, see the statute of 31 Eliz. c. 7, which could not be restrained in such sort as they are, but by authority of Parliament.

There was a statute made *anno* 35 Eliz. (when I was speaker) against buildings in the cities of London and Westminster, or within three miles of the gates of the city of London, and against the dividing and converting of any dwelling-house or building into divers habitations, and against inmates, but that endured but for seven years, and until the end of the next session of Parliament, which act being holden dangerous, was not continued at the session of Parliament holden in the 43 Eliz., being the next session after the seven years, and therefore expired with the same. In the mean time there was a law made against new buildings &c., which then was a warrant, and since hath been a colour for divers proceedings in courts of justice, not observing the expiration of that law; but now that law hath long since lost his force, and the ancient and fundamental common law is to be followed.

(a) See the 2d part of the Institutes. W. 2. ca. 24. lib. 5. fo. 101. lib. 8. fo. 46. lib. 9. fo. 54. 58. (b) See lib. 4. f. 24, Lutterel's Case, and the authorities there cited. (c) 31 Eliz. ca. 7.



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THE END.

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